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In The

# Supreme Court of the United States

October Term, 1994

THE STATE OF UTAH, BY AND THROUGH THE UTAH STATE DEPARTMENT OF HEALTH, and KENNECOTT CORPORATION,

*Petitioners,*

v.

SALT LAKE COUNTY WATER CONSERVANCY DISTRICT,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Is immediate appeal available from a district court's refusal to enter a jointly supported consent decree that is proposed by a government Trustee acting pursuant to a federal statute (CERCLA) which explicitly favors "minimiz[ing] litigation"?

(2) Did the court below err in holding, contrary to decisions in four other circuits, that district court rejection of a settlement does not conclusively determine the disputed question under the collateral order doctrine?

## PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner State of Utah was plaintiff-appellant below; Petitioner Kennecott Corporation was defendant-appellant below; Respondent Salt Lake County Water Conservancy District was intervenor-appellee below.

Petitioner Kennecott Corporation is a wholly-owned subsidiary of RTZ America Inc. RTZ America Inc. is a wholly-owned subsidiary of RTZ Western Holdings Limited. RTZ Western Holdings Limited is a wholly-owned subsidiary of RTZ European Holdings Limited. RTZ European Holdings Limited is a wholly-owned subsidiary of The RTZ Corporation PLC.

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*Petitioners,*

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SALT LAKE COUNTY WATER CONSERVANCY DISTRICT,

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

The court below declined to review the district court's refusal to enter a consent decree to settle a claim for natural resource damages brought by a government Trustee pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. That jurisdictional decision raises compelling questions of public policy regarding CERCLA and the statutory rights of government Trustees. These questions will likely recur as increasing numbers of claims for natural resource damages are brought and

settled under CERCLA and other federal and state environmental statutes.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on January 31, 1994.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1A-18A) is reported at 14 F.3d 1489. The opinion of the district court (App., *infra*, 1B-46B) is reported at 801 F. Supp. 553.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit dismissed the appeal in this case for lack of jurisdiction on January 31, 1994. The court of appeals denied a timely petition for rehearing and suggestion for rehearing in banc on March 28, 1994. On Petitioners' motion, the court of appeals ordered that the mandate shall be stayed until July 25, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## PERTINENT STATUTORY PROVISION

Section 1291 of Title 28, United States Code, provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

## STATEMENT OF THE CASE

Petitioner State of Utah, acting as Trustee of public natural resources under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 ("the CERCLA Trustee"), brought a claim against Petitioner Kennecott Corporation ("Kennecott") for damages resulting from alleged contamination of certain ground water and surface water. The CERCLA Trustee negotiated a settlement of the claim pursuant to statutory authority and submitted a consent decree to the district court for approval. Although both the CERCLA Trustee and Kennecott urged approval of the consent decree, the court refused to enter the settlement following *de novo* review. The CERCLA Trustee and Kennecott both appealed, arguing that the district court's misreading of CERCLA frustrated the clear congressional purpose of CERCLA's provisions for

natural resource damage claims. The Tenth Circuit subsequently held that no immediate appeal could be taken from the district court's action, relying on its decision regarding appeal from denial of a private settlement agreement in *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir. 1993), which was then before this Court.

This Court recently affirmed the Tenth Circuit as to interlocutory appeal from denial of a private settlement agreement. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994). However, this Court explicitly noted "sound reasons for treating [privately conferred rights] differently from those originating in the Constitution or statutes." *Id.* at 2001.

The Tenth Circuit's decision in this case also conflicted with the analysis applied in four other circuits regarding this Court's requirement of a conclusive determination where interlocutory appeal is taken from denial of a settlement.

### A. The CERCLA Complaint and Proposed Settlement

The State of Utah, acting through the Utah Department of Health, which was then designated as the CERCLA Trustee for natural resources in Utah,[1] filed a complaint against Kennecott in October 1986 alleging contamination of certain ground water and surface water,

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[1] The CERCLA Trustee in Utah is now Dianne R. Nielson, Ph.D., Executive Director of the Utah Department of Environmental Quality.

and seeking to recover damages for injury to those natural resources under CERCLA. The district court stayed the proceedings to allow the parties to conduct technical studies. Upon completion of those studies, the CERCLA Trustee and Kennecott entered into settlement negotiations, and in July 1991 the parties jointly submitted a proposed consent decree to the district court settling the CERCLA Trustee's claim. App. 14B. The proposed settlement was subjected to public comment, App. 15B, and some provisions were modified in response to the comments received. The consent decree provided for Kennecott to pay the CERCLA Trustee $12 million as settlement for claimed injuries to ground water and surface water within a defined region in exchange for a limited release and covenant not to sue. App. 4A.

### B. Intervention by Salt Lake County Water Conservancy District

In September 1991, the Salt Lake County Water Conservancy District moved to intervene in opposition to the proposed settlement. App. 15B-16B. The district court granted permissive intervention for the limited purposes of participating in discovery and in evidentiary hearings. App. 16B.

### C. District Court Refusal to Enter Proposed Consent Decree

After a period of discovery, the district court held a six-day evidentiary hearing and heard legal arguments from the CERCLA Trustee, Kennecott, and the Salt Lake

County Water Conservancy District. App. 16B. The district court found that the CERCLA Trustee and Kennecott had conducted negotiations with "candor, openness, and bargaining balance." App. 32B n.13 (citation omitted). However, based on *de novo* review of the consent decree and the supporting technical data, the district court found that the CERCLA Trustee had failed to prove by "a preponderance of the evidence" that the consent decree "satisf[ied] substantive fairness under CERCLA." App. 34B-35B. In its Memorandum Decision and Order ("Order"), the court denied approval of the consent decree and ordered the parties to prepare for trial. App. 45B-46B.

### D. Appeals by Both the CERCLA Trustee and Kennecott

The CERCLA Trustee and Kennecott timely appealed the district court's decision, arguing that the district court had misread CERCLA in its review of the proposed settlement. The CERCLA Trustee and Kennecott jointly argued that the Tenth Circuit had jurisdiction over the appeal on three grounds: (1) The collateral order doctrine under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and its progeny; (2) precedent regarding a "practical rather than a technical construction" of the finality requirement of 28 U.S.C. § 1291 (*Cohen*, 337 U.S. at 546; *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 279 (1980); *Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984)); and (3) statutory allowance of immediate appeal

from district court orders which grant or deny injunctive relief (28 U.S.C. § 1292(a)(1)). App. 2A.

The Tenth Circuit heard oral argument on jurisdiction and on the merits, but dismissed the appeal for lack of jurisdiction on January 31, 1994. App. 2A. That court found, *inter alia*, that the appeal failed to satisfy the requirements of the collateral order construction of the final judgment rule. App. 14A. The CERCLA Trustee and Kennecott filed a timely petition for rehearing and suggestion for rehearing in banc which was denied on March 28, 1994. App. 1C.[2]

The circuit court based its jurisdictional result partly on its earlier decision in *Desktop Direct*, 993 F.2d 755, which this Court recently affirmed as it applied to denial of a disputed private settlement agreement. *Digital Equip.*, 114 S. Ct. at 2004. This Court's decision leaves unresolved the issue in the current case, which is the district court's denial of an important right that is conferred by federal statute and is deeply rooted in public policy. *Id.* at 2001-02. This Court's decision also does not address the circumstances here, where the parties' commitment to this settlement has not wavered. Unlike the *Digital Equipment* parties, whose settlement agreement unraveled, Petitioners in this case have jointly supported entry of the proposed consent decree and continue to do so.

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[2] On Petitioners' motion, the Tenth Circuit ordered that the mandate shall be stayed until July 25, 1994.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because this case presents precisely the conflict that was left unaddressed in *Digital Equipment*: the conflict between an important right conferred by federal statute (here, the CERCLA Trustee's right to bring and settle a claim for natural resource damages) and the efficient operation of the federal courts as protected under 28 U.S.C. § 1291. This Court suggested in *Digital Equipment* that the "importance" requirement for interlocutory appeal would likely be satisfied where the right at issue is rooted in statute. *Digital Equip.*, 114 S. Ct. at 2001-02. Moreover, unlike the situation in *Digital Equipment*, there is no means of redress here except for immediate appeal. This Court suggested that the parties to the disputed settlement in *Digital Equipment* could pursue a separate action for breach of contract after final judgment. *Id.* at 2003. That avenue is not open here, however, where the parties maintain joint support for the proposed settlement. Whether this matter proceeds to trial or is resolved by a different settlement, it will be impossible for the parties to obtain appellate review of the district court's decision to reject *this* settlement, a decision that infringes an important right of the CERCLA Trustee.

This Court should also grant certiorari because the decision below parts company with four other circuit courts[3] and misreads this Court's

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[3] *See Transtech Indus. v. A & Z Septic Clean*, 5 F.3d 51 (3d Cir. 1993), *cert. denied*, 62 U.S.L.W. 3826 (U.S. June 14, 1994); *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th

precedents[4] in concluding that district court rejection of a particular settlement agreement is not "conclusive." The Tenth Circuit's misreading of this Court's decisions will infringe on the right of government Trustees to manage litigation, including settlement, of natural resource damage claims by denying their right to seek appellate review of wrongly rejected settlements. That result will undermine congressional policy encouraging CERCLA settlements.

This Court may wish to consider summary disposition of this case for two reasons: This Court's recent decision in *Digital Equipment* sheds new light on the issues of "importance" and "effective unreviewability" regarding interlocutory appeal, and the decision below regarding "conclusive determin[ation of] the disputed question" deviates from this Court's precedents, decisions in four other circuit courts, and the Tenth Circuit's own recent decision in *Desktop Direct*.

## I. THIS COURT SHOULD CLARIFY WHETHER A CERCLA TRUSTEE'S RIGHT TO BRING, TRY, AND SETTLE CLAIMS IS "IMPORTANT" AND NOT EFFECTIVELY REVIEWABLE ON APPEAL AFTER TRIAL.

In the decision below, the Tenth Circuit disregarded statutory language by disparaging CERCLA settlements

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Cir. 1991); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990).

[4] *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Cohen*, 337 U.S. 541 (1949).

as not "important" as that term is used to determine the availability of interlocutory appeal. This Court should grant certiorari to clarify whether denial of a government Trustee's statutory right to settle a natural resource damage claim under CERCLA and the concomitant frustration of the congressional purpose and public policy underlying that statute satisfy the legal requirement of "importance" for purposes of interlocutory appeal. *See* S. Ct. Rule 10.1(c).

### A. Statutory Framework for Natural Resource Damage Claims

CERCLA, which was heralded as "the most important environmental legislation in this decade,"[5] created a legal framework for governmental response to releases of hazardous substances and injuries to publicly owned natural resources resulting therefrom. This "powerful corrective and compensatory mechanism"[6] created legal claims for injuries to natural resources, and it required the President and each governor to designate Natural Resources Trustees with exclusive and plenary power to bring, assess, try, and settle such claims.[7]

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[5] 126 Cong. Rec. 30,937 (1980) (statement of Sen. Moynihan); *see also* S. Rep. No. 848, 96th Cong., 2d Sess. 105 (1980) (letter from President Jimmy Carter urging "prompt consideration and speedy enactment" of CERCLA, because "[t]he health of the public and the environment cannot afford less.").

[6] Frederick R. Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C. Envtl. Aff. L. Rev. 405, 408-09 (1989).

[7] Section 107 of CERCLA, 42 U.S.C. § 9607, provides that the United States or any state can bring a claim against a

The "primary objective [of CERCLA's natural resource damage provisions] was to achieve restoration [of the injured resources]." *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 450-51 (D.C. Cir. 1989) (citations omitted).[8] To this end, CERCLA mandates that sums

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responsible party for "an injury to, destruction of, or loss of natural resources." 42 U.S.C. § 9607(f)(1); CERCLA § 107(f)(1). *See also* 42 U.S.C. § 9607(a)(4)(C); CERCLA § 107(a)(4)(C). CERCLA requires each governor to appoint a Trustee to assess any injuries that might occur to natural resources held in the public trust and to bring damage claims for those injuries. 42 U.S.C. § 9607(f)(2)(B); CERCLA § 107(f)(2)(B). CERCLA also requires the President to designate federal Trustees for federal natural resources. 42 U.S.C. § 9607(f)(2)(A); CERCLA § 107(f)(2)(A). The term "government Trustee" applies to individuals designated as state, federal or tribal Trustees.

Determination of the first question presented in this case will resonate beyond CERCLA, as it will affect the rights of government Trustees under other federal environmental statutes. *See* Oil Pollution Act of 1990 § 1002(b)(2)(A), 33 U.S.C. § 2702(b)(2)(A); Federal Water Pollution Control Act § 311(f)(4), (5), 33 U.S.C. § 1321(f)(4), (5); Marine Protection, Research and Sanctuaries Act § 312, 16 U.S.C. § 1443(a)(1), (c). Congress's use of appointed Natural Resources Trustees in other environmental legislation underscores both the importance of these claims and Congress's satisfaction with the Trustee-driven approach to them. Moreover, many state environmental statutes are based on the CERCLA model. *See generally* Lloyd W. Landreth & Kevin M. Ward, *Natural Resource Damages: Recovery Under State Law Compared With Federal Laws*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10134 (April 1990). Thus the determination in this case may affect implementation of state laws to the extent that claims under state environmental statutes are brought in federal courts.

[8] As Senator Mitchell noted in floor debate over CERCLA, "[W]e do not want damage to natural resources to await the workings of that process [of pursuing a final determination in

recovered by government Trustees in natural resource damage actions can be used "only to restore, replace, or acquire the equivalent of such natural resources." 42 U.S.C. § 9607(f)(1); CERCLA § 107(f)(1).[9]

Claims for injuries to natural resources under CERCLA and other federal environmental statutes are growing, are highly complex technically and, if tried, place significant burdens on judicial and government resources. Assessing the injuries to bring the claims can be extraordinarily complex. In the wake of "the worst marine environmental disaster this nation has ever experienced,"[10] the Exxon Valdez oil spill in Alaska, approximately fifty-one assessment studies were performed to evaluate injury to the many types of resources affected.[11]

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court]; we want prompt, full compensation in such cases so we can replant trees in the park." 126 Cong. Rec. 30,942 (1980).

[9] "[C]ustomarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment." *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1035 (D. Mass. 1989).

[10] Thomas A. Campbell, *Natural Resource Damage Assessments: A Glance Backward and a Look Forward*, 45 Baylor L. Rev. 221, 221 (1993) (quoting President George Bush) (citation omitted).

[11] Resources, Community, and Economic Dev. Div., U.S. Gen. Accounting Office, *Natural Resources Damage Assessment: Information on Study of Seabirds Killed by Exxon Valdez Oil Spill*, Report to Hon. Frank H. Murkowski, U.S. Senate 1 (Nov. 1991).

These are only the first rumblings of an anticipated litigation explosion involving natural resource damage claims.[12]

Settlement of natural resource damage claims under CERCLA and the statutory rights of CERCLA Trustees are important areas of the law that this Court has not yet examined. Clarifying the jurisdiction of circuit courts to hear appeals of rejected settlements will be critical as claims are brought and settlements are proposed under

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[12] *See, e.g.*, Frank L. Amoroso & Linda R. Keenan, *Natural Resource Damage Recovery Actions: A Legal Tidal Wave Looming*, 17 Westchester B.J. 109 (1990); Mehron Azarmehr, *Natural Resources Damages Under CERCLA § 107: How the Liability Rules Differ Between Actions for Natural Resource Damages and Response Costs*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10655, 10665 (Oct. 1992) ("the stage is set for an explosion of litigation involving staggering stakes"); Bradley M. Marten & Cestjon L. McFarland, *Litigating CERCLA Natural Resource Damage Claims*, 22 Env't Rep. (BNA) 670, 670 (July 19, 1991) (quoting a top official of the National Oceanic and Atmospheric Administration as expecting "the number of specific natural resource damages cases before the courts to increase exponentially") (citation omitted).

Filing of natural resource damage claims has been slowed by delays by the U.S. Department of the Interior ("DOI") in promulgating regulations for natural resource damage assessments, and by subsequent legal challenges to those regulations. Most of the final regulations were published on March 25, 1994 (59 Fed. Reg. 14,261) and can be expected to lead to a new wave of claims by government Trustees. *See also* 59 Fed. Reg. 23,098 (1994) (DOI's proposed regulations). The National Oceanic and Atmospheric Administration is developing regulations to govern assessments of claims for natural resource damages due to oil spills pursuant to the Oil Pollution Act of 1990. Proposed regulations, which were published on January 7, 1994 (59 Fed. Reg. 1,062), are similar to the DOI regulations for CERCLA.

CERCLA and other federal and state statutes by federal, tribal, and state Natural Resources Trustees.[13]

### B. Congress Expressly Intended to Encourage CERCLA Trustees to Settle Claims

Congress enacted CERCLA in 1980 "to encourage prompt and effective responses to hazardous waste releases." *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992). Congress amended and reauthorized CERCLA in 1986[14] and explicitly "refocus[ed] the intent of [CERCLA] back on cleaning up the sites and away from the slow and costly litigation. . . . [This amendment will lend] some strong impetus to settlements out of court." 131 Cong. Rec. 24,727 (1985) (statement of Sen. Domenici); *see also id.* at 24,728 (statement of Sen. Simpson: "[W]hat pleases me most [about these amendments] is that we bring Superfund back into the real world, by promoting settlements. Let us urge companies to settle."); *id.* at 24,729-30 (statement of Sen. Domenici: Prior to the proposed amendments, the "litigation driven policy . . . add[ed] years to cleanup as cases crawl[ed] through the Federal courts, . . . incurring staggering

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[13] Efficient operation of the federal courts as protected under 28 U.S.C. § 1291 would best be served by early resolution of the underlying question in this case regarding judicial review of a CERCLA Trustee's proposed consent decree in a natural resource damage claim. Allowing interlocutory appeal here will not loose a flood of appeals, but rather will settle this legal question and provide guidance for lower courts in similar cases.

[14] *See* Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

transaction costs. . . . The Superfund problem is protracted litigation."). CERCLA explicitly encourages settlement of claims "[w]henever practicable and in the public interest . . . in order to expedite effective remedial actions and minimize litigation." 42 U.S.C. § 9622(a); CERCLA § 122(a).[15]

Courts have frequently acknowledged this congressional intent as well as the strong legal and public policies favoring settlement of CERCLA actions.[16] At least one court has found "the strong policy in favor of settlement in CERCLA actions" so powerful that it approved a proposed consent decree even though some parties to the consent decree ultimately opposed its entry. *United States v. Atlas Minerals and Chems., Inc.*, 1994 U.S. Dist. LEXIS 2441 at *24 (E.D. Pa. March 1, 1994) (the objecting parties

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[15] Although this section of CERCLA refers to "the President" rather than explicitly to CERCLA Trustees, courts have relied on this provision to recognize "CERCLA's primary goal to encourage early settlement" in claims for natural resource damages brought by state and local governments. *United States v. Montrose Chem. Corp.*, 827 F. Supp. 1453, 1458 (C.D. Cal. 1993) (natural resource damage claim brought by United States and State of California); *see City of New York v. Exxon Corp.*, 697 F. Supp. 677, 692-93 (S.D. N.Y. 1988) (natural resource damage claim brought by City of New York).

[16] *See, e.g., United States v. Montrose Chem. Corp.*, 793 F. Supp. 237, 240 (C.D. Cal. 1992) ("CERCLA's overriding goal of achieving prompt settlement"); *Acushnet River*, 712 F. Supp. at 1029 ("Congressional purpose [of CERCLA] is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation. Without question, Congress passed the SARA amendments to encourage settlements for this very reason.").

argued that after the consent decree had been filed with the court, serious issues regarding its legality were raised by a circuit court decision in an unrelated case).

The rights and powers of CERCLA Trustees serve the congressional intent that animated passage and amendment of the federal statute: The Trustees serve as guardians of congressional intent regarding CERCLA as they bring claims in order to restore, replace, or acquire natural resources equivalent to those injured by releases of hazardous substances, and as they negotiate settlements in order to avoid the time and expense of protracted litigation and to speed restoration of the injured resources.

### C. Denial of the Right of a CERCLA Trustee Regarding Settlement of a Statutory Claim Meets This Court's Requirement of An Important Question Effectively Unreviewable on Appeal From Final Judgment

This Court has held that a nonfinal order is appealable immediately if it is "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen*, 337 U.S. at 546-47. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court set out three requirements that a nonfinal order must meet to qualify for interlocutory appeal: It must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers*, 437 U.S. at 468 (citations omitted).

In *Digital Equipment*, this Court elaborated on the third requirement under *Coopers* and set as the standard "decisions . . . that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equip.*, 114 S. Ct. at 1995-96 (citation omitted). In the same opinion, this Court determined that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders," because "rights under *private settlement agreements* can be adequately vindicated on appeal from final judgment." *Id.* at 1994-96 (emphasis added). This Court also suggested that denial of rights that are grounded in statute and deeply rooted in public policy would rise to the level of "importance" required for appeal under 28 U.S.C. § 1291. *Id.* at 2001-02. This Court should grant certiorari to clarify whether rejection of a government settlement of a federal statutory claim, a settlement that furthers an express congressional purpose and which both parties support, qualifies for appellate review, even if rejection of a disputed private settlement, such as that in *Digital Equipment*, does not.[17]

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[17] The Tenth Circuit did not address the collateral nature of the issue raised on appeal in this case. Clearly, however, the question of the district court's misreading of CERCLA in reviewing the CERCLA Trustee's proposed consent decree is completely separate from the merits of the CERCLA action, which would involve, for example, questions of liability and causation. The district court Order therefore meets the second requirement for interlocutory appeal under *Coopers* by resolving an important issue completely separate from the merits of the action.

### 1. Denial of the CERCLA Trustee's Right Is An Important Question

In this case, the Tenth Circuit referred to its own recent decision in *Desktop Direct* and held that "[t]he bare desire of [the CERCLA Trustee] and Kennecott to avoid trial is not 'important' enough to justify ignoring the § 1291 prerequisite of finality." App. 12A. Because it focused so narrowly on the right not to go to trial, the Tenth Circuit ignored the main point of the appeal, which is that the district court's refusal to enter the consent decree improperly interfered with the CERCLA Trustee's statutory authority to settle this claim. The circuit court here defied congressional policy expressly favoring settlement of CERCLA claims, deprecating CERCLA settlements as not "important."

The district court in this case denied the CERCLA Trustee's right regarding settlement of its claim when the court made errors of law which included applying an unprecedented and improper standard of review to the Trustee's proposed consent decree.[18] The district court's

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[18] The court examined the CERCLA Trustee's proposed consent decree under a "preponderance of the evidence" standard, App. 34B, conducting its review *de novo* and substituting its judgment for that of the CERCLA Trustee in assessing the merits of the settlement. For example, although the proposed consent decree explicitly reserved the CERCLA Trustee's right to bring later claims regarding any alleged contamination outside of the geographic area specified in the settlement, and although the CERCLA Trustee had determined the limits of that geographic area based on various multi-year studies, the district court inexplicably rejected the CERCLA Trustee's determination and, based in part on the court's own conclusions

decision flies in the face of court decisions consistently counseling judges that congressional intent requires courts to use a deferential standard in evaluating proposed CERCLA settlements, in all of their technical complexity,[19] and emphasizing that presumptions favoring proposed CERCLA settlements are particularly strong where a government party is involved.[20] The district court's denial of the proposed consent decree departed dramatically from legal precedent in this area and frustrated congressional intent to minimize CERCLA litigation by encouraging settlement.

Congress encouraged settlement of CERCLA cases because they are often highly complex technically and are notorious for bearing litigation and other transaction costs which rival the value of the underlying claims.[21]

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regarding the area potentially affected, the court then rejected the proposed consent decree. App. 21B.

[19] *See, e.g., United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) ("while the district court should not mechanistically rubberstamp the agency's suggestions, neither should it approach the merits of the contemplated settlement *de novo*."); *United States v. Acton Corp.*, 733 F. Supp. 869, 872 (D. N.J. 1990) (it is not the district court's role to "determine whether a better settlement could be calculated . . . . A more intrusive role would prove unduly burdensome and contravene Congressional intent by having [the] Court substitute its judgment for that of the statutorily appointed representatives of the public interest . . . . ").

[20] *See, e.g., Cannons*, 899 F.2d at 84 (presumptions that attach to a settlement have "particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.") (citations omitted).

[21] After the Exxon Valdez oil spill in Alaska, costs were approximately $130 million simply for state and federal

When approval of a proposed consent decree is improperly denied, the ability of a government Trustee to settle and the incentive of a potentially liable party to settle are both undermined. The question of the parties' recourse when a CERCLA consent decree is improperly denied is therefore deeply compelling, both to the parties and to the public.

In addition to these important issues of public policy regarding judicial review of CERCLA settlements, there are important reasons of legal policy to allow immediate appeal under the circumstances of this case. This is not simply a private settlement agreement gone sour or challenged by a third-party spoiler. It is, rather, an agreement between a private party and a duly-appointed guardian of the public trust, both of which parties maintain support for the agreement. Moreover, the parties reached the agreement by acting pursuant to a federal statute that sets out requirements and incentives for settlement. In this highly regulated atmosphere, the CERCLA Trustee and Kennecott conducted five years of technical studies and negotiations with "candor, openness, and bargaining balance." App. 32B n.13 (citation omitted). After reaching a settlement agreement, subjecting it to public review and comment, modifying the terms of the consent decree in response to those comments, and answering the district

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Trustees to assess natural resource damages. Campbell, *supra* note 10, at 227 (citation omitted). Exxon may have spent just as much money attacking the assessments. *Id.* at 230. The natural resource damage claim subsequently settled for $1 billion. *Id.* at 225 n.14; David T. Buente, Jr., Thomas G. Echikson, James L. Connaughton, *The "Civil" Implications of Environmental Crimes*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10589, 10598 n.100 (Oct. 1993).

court's questions in a six-day evidentiary hearing, these parties' proposal was rejected through errors of law that the Tenth Circuit does not even advert to in letting the errors stand.

This Court should grant certiorari to examine the Tenth Circuit's interpretation of "importance" under these circumstances, where the district court denied the statutory right of a government Trustee to bring and settle a claim regarding injuries to natural resources held in the public trust.

### 2. Denial of the CERCLA Trustee's Right Is Effectively Unreviewable On Appeal From Final Judgment

Denial of the CERCLA Trustee's right to bring and settle a claim for natural resource damages cannot be effectively reviewed on appeal from final judgment. On this point, this case poses a conundrum that was not present in *Digital Equipment*. The court below found that appellate review was unavailable, in part because "the trial court did not foreclose future proposed consent decrees" in this case. App. 9A. However, if the parties negotiate further and reach a new settlement that is approved by the district court, then there will be no final judgment on this settlement, and an appeal will still be barred. Alternatively, if the parties proceed to trial and final judgment, then the current settlement terms will be lost, and no appeal at that stage will revive them. Moreover, whereas a party to a settlement agreement that went awry might have recourse after final judgment to bring an action against the other party for breach of contract,

*see Digital Equip.* at 2003, Petitioners here jointly support the proposed consent decree and thus will have no such recourse. If denial of this settlement is not reviewed immediately, then the CERCLA Trustee's right to bring and settle this claim will be infringed with no opportunity for redress.

This Court has recognized that interlocutory appeal is appropriate where a district court order denying a consent decree might have "the 'serious, perhaps irreparable, consequence' of denying the parties their right to compromise their dispute on mutually agreeable terms." *Carson v. American Brands, Inc.*, 450 U.S. 79, 87-88 (1981) (denial of consent decree found appealable under 28 U.S.C. § 1292(a)(1); determination of appealability under 28 U.S.C. § 1291 explicitly reserved). Where, as here, the plaintiff and defendant reached a settlement agreement but were then denied their right to settle on their negotiated terms, and where they jointly seek to appeal from that denial, postponing the appeal through rigorous application of the final judgment requirement would rob them of any meaningful opportunity to protect their important statutory interests.

Moreover, forcing the parties to litigate the claim to final judgment would contravene Congress's express intent for CERCLA natural resource damage claims, which was to avoid protracted litigation and encourage settlement so that CERCLA Trustees might expeditiously

obtain funds and spend them to "put shovels in the ground, not lawyers in the courtroom."[22]

## II. THE TENTH CIRCUIT'S HOLDING THAT REJECTION OF A SETTLEMENT IS NOT A "CONCLUSIVE DETERMINATION" IS ERRONEOUS AND CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS.

The first requirement that a nonfinal order must meet under *Coopers & Lybrand v. Livesay* is that it "conclusively determine the disputed question." *Coopers*, 437 U.S. at 468 (1978) (citations omitted). The Tenth Circuit's holding that the Order failed to meet this requirement conflicts with all other circuit court decisions concerning interlocutory appeal from denial of a settlement agreement, including the Tenth Circuit's own recent decision in *Desktop Direct*. This Court should grant certiorari to resolve the conflict among circuit courts. *See* S. Ct. Rule 10.1(a).

### A. Recent Decisions of the Second, Third, Fifth, and Eleventh Circuits

Recent collateral order cases from the Second, Fifth and Eleventh Circuits have arisen from efforts to settle private employment disputes.[23] Each case has involved

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[22] 131 Cong. Rec. 34,642 (1985) (statement of Rep. Johnson); *see also* discussion of congressional intent to encourage settlement in order to speed restoration of injured resources at 14-16, *supra*.

[23] Although some aspects of the circuit court decisions discussed here may have been overturned by *Digital Equipment*, the

an employee who brought suit against an employer, later agreed to settle, and then subsequently attempted to set aside the settlement or release and bring a new suit. In *Janneh v. GAF Corp.*, the employee asked the district court to set aside a settlement agreement, alleging that he had been coerced to sign it. 887 F.2d 432, 434 (2d Cir. 1989). In *Grillet v. Sears, Roebuck & Co.*, and *Forbus v. Sears Roebuck & Co.*, the employees alleged that duress and misrepresentation in the settlement process made the releases unenforceable, while the employers alleged that the agreements were enforceable because the employees had ratified the agreements by accepting payments under them. *Grillet*, 927 F.2d 217, 218 (5th Cir. 1991); *Forbus*, 958 F.2d 1036, 1038 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992). In each case, the district court declined to enforce the settlement agreement or release. When the employer appealed in each case, the circuit court held that it had jurisdiction under the *Coopers* analysis of the collateral order doctrine. *Janneh*, 887 F.2d at 434-36; *Grillet*, 927 F.2d at 219-20; *Forbus*, 958 F.2d at 1039-40.

These cases all found that the "conclusive determination" test was met where the district court refused to enforce a settlement agreement. In *Janneh*, the Second Circuit considered the first requirement under *Coopers* and held that the district court decision conclusively determined the issue of "whether settlement was reached." *Janneh*, 887 F.2d at 434. In *Grillet*, the Fifth Circuit found that the district court's decision had been "the final word on whether Grillet had effectively

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analysis of "conclusive determination" in these cases remains undisturbed.

released Sears from suit." *Grillet*, 927 F.2d at 219. The Eleventh Circuit in *Forbus* similarly found that the district court's decision "was intended to be the final word on whether Sears could avoid litigation on the basis of the releases." *Forbus*, 958 F.2d at 1039. Finally, the Third Circuit also held recently that a district court's rejection of a private settlement was conclusive. *Transtech Indus. v. A & Z Septic Clean*, 5 F.3d 51, 57 (3d Cir. 1993), *cert. denied*, 62 U.S.L.W. 3826 (U.S. June 14, 1994).[24]

### B. The Tenth Circuit's Erroneous Analysis of "Conclusive Determination"

The Tenth Circuit parted company with the other circuit courts in applying the requirement of conclusive determination to the disputed question in this case. The Tenth Circuit stated: "We conclude the better reasoned rule finds a denial of a settlement does not conclusively determine the parties' ability to settle." App. 8A.[25] The circuit court contrived a nonfinal result while ignoring two conclusive determinations made by the district court

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[24] The dispute in *Transtech*, which arose out of CERCLA, was among private parties. The circuit court's holding that interlocutory appeal was not available therefore did not implicate the rights of CERCLA Trustees, as the circuit court decision does in this case.

[25] The Tenth Circuit thereby implicitly disagreed with its own determination in *Desktop Direct* that "[t]he first requirement is that the [district court] order conclusively determine the *validity or enforceability* of the settlement agreement." *Desktop Direct*, 993 F.2d at 757 (finding requirement of conclusive determination satisfied where district court set aside settlement agreement) (emphasis added).

and challenged by Petitioners: (1) CERCLA requires that consent decrees proposed in certain circumstances be reviewed *de novo* or under a "preponderance of the evidence" standard, App. 34B, and (2) "[A]pproval of the proposed Consent Decree is denied," App. 45B. The Tenth Circuit's decision to ignore the finality of the district court's order puts it at odds with the other circuit courts.[26]

In the language of this Court, the district court's order rejecting the consent decree was not "inherently tentative," *Coopers*, 437 U.S. at 469 n.11. There is "no basis to suppose that the District Judge contemplated any reconsideration of his decision" regarding either his reading of CERCLA or approval of this consent decree. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 (1983). Neither is "some revision [of the decision] reasonably . . . expected in the ordinary course of litigation" regarding either point. *Id.* at 12 n.14.

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[26] The Tenth Circuit tried to shore up its decision by citing the Second Circuit's opinion in *Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978) (finding that immediate appeal was not available from an order disapproving a settlement agreement in stockholder derivative actions). App. 7A-8A. The Second Circuit noted, however, that "[t]he determination of whether to approve a Rule 23.1 settlement is peculiarly an amalgam of fact and law." *Seigal*, 590 F.2d at 38. The Second Circuit distinguished *Seigal* in its *Janneh* opinion, noting that appellate review of the order in *Seigal* would have involved the court in assessing the merits of the underlying case, and would therefore not have met the *Coopers* requirement of an issue "completely separate from the merits of the action." *Janneh*, 887 F.2d at 435 n.4. The *Seigal* decision, therefore, by the Second Circuit's own analysis, does not effectively bolster the Tenth Circuit's decision on the *Coopers* requirements at issue here.

Although the Tenth Circuit correctly pointed out that the CERCLA Trustee and Kennecott are free to submit other agreements for the district court's approval, App. 9A-10A, the circuit court ignored the fact that the district court conclusively – and erroneously – determined the standard of review for consent decrees proposed under CERCLA in the future. The Order is the final word on the standard of review that the district court applied here and, most importantly, *will apply to any settlement that may be proposed in the future.* The district court's Order thus satisfies the first requirement under *Coopers*, and, in light of this Court's precedents, the Tenth Circuit erred in ruling otherwise.

* * *

This case presents compelling grounds for application of the collateral order doctrine. The decision below announces that efficient operation of the federal courts as protected from interlocutory appeals under 28 U.S.C. § 1291 is to be promoted at the expense of the rights of a CERCLA Trustee who acts pursuant to a federal statute and its underlying roots in public policy, and who attempts to carry out explicit congressional intent in bringing and settling a claim for injury to natural resources held in trust for the public. Moreover, the decision below forecloses any meaningful opportunity for the parties supporting the settlement to seek redress. This Court should grant certiorari to clarify the effect of its recent decision in *Digital Equipment* on the jurisdictional question in this case.

In addition, the Tenth Circuit's "better reasoned rule" regarding conclusive determination for purposes of interlocutory appeal, announced in this case, conflicts with this Court's precedents and decisions in four other circuits. This Court should grant certiorari to resolve the conflict.

## CONCLUSION

The petition for a writ of certiorari should be granted. This Court may wish to consider summary disposition of this case in view of its recent opinion in *Digital Equipment* and because the decision below deviates from this Court's precedents and decisions of four other circuit courts regarding "conclusiveness."

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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STATE OF UTAH, By and Through the UTAH STATE DEPARTMENT OF HEALTH, Plaintiff-Appellant,

v.

KENNECOTT CORPORATION, Defendant-Appellant and Cross-Appellee,

SALT LAKE COUNTY WATER CONSERVANCY DISTRICT, Intervenor-Appellee and Cross-Appellant.

Nos. 92-4173, 92-4179 and 92-4180.

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January 31, 1994

Fred G. Nelson (Jan Graham, Atty. Gen.; R. Paul Van Dam, and Denise Chancellor, Utah Atty. General's Office, with him on the brief), Salt Lake City, UT, for plaintiff-appellant State of Utah; David W. Tundermann (James B. Lee, Daniel M. Allred, Jim Butler, and Lisa A. Kirschner with him, on the briefs) of Parsons Behle & Latimer, Salt Lake City, UT, for defendant-appellant and cross-appellee Kennecott Corp.

Douglas J. Parry of Parry Murray Ward & Cannon, Salt Lake City, UT, and Dale F. Gardiner, Salt Lake County Water Conservancy Dist., West Jordan, UT (Blake S. Atkin of Parry Murray Ward & Cannon, Salt Lake City, UT, with him on the briefs), for intervenor-appellee and cross-appellant.

Rex E. Lee, Richard B. Stewart, and James L. Connaughton of Sidley & Austin, Washington, DC, for amicus curiae Western Regional Council.

Maria Savasta Kennedy and Laurens H. Silver of Sierra Club Legal Defense Fund, San Francisco, CA, and Kenley W. Brunsdale, Salt Lake City, UT, for amici curiae Sierra Club and the Mineral Policy Center.

Before BALDOCK, McWILLIAMS, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

Both the State of Utah and Defendant Kennecott Corporation appeal an order of the federal district court denying a motion to approve and enter a consent decree submitted by the parties. The proposal would settle Utah's claim for natural resources damages under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. Salt Lake County Conservancy District (District), a permissive intervenor in the proceeding below, cross-appeals the trial court's decision to deny the District intervention as a matter of right. The District also moves to dismiss the appeal of Utah and Kennecott for lack of jurisdiction. We are asked to review a nonfinal order of a district court under various exceptions to 28 U.S.C. § 1291 including (1) the collateral order exception to the finality doctrine, (2) this court's interpretation of pragmatic finality, and (3) an interlocutory order with the practical effect of granting or denying injunctive relief. We grant the motion to dismiss for lack of jurisdiction.

## BACKGROUND

Kennecott, Utah, and various local governments have, since 1983, studied the threat of groundwater contamination from Kennecott's Bingham Canyon mining operations in Salt Lake County. In 1986, Utah filed CERCLA claims, presumably to preserve its rights in light of CERCLA's statute of limitations. At that time, asserted damages were $129 million based on potential injury to 109,215 acre feet of groundwater over a ten to twenty year period. Prior to the 1992 memorandum and order of the trial court,[1] various stays were granted to allow settlement negotiations and the completion of technical studies.

Kennecott's first settlement proposal offered the assignment of their water rights (valued at $2 million) plus $100 million for remediation of the contaminated water in exchange for dismissal of the lawsuit. Kennecott also proposed to take independent action to reduce continued pollution from the mining operation sources and to remediate heavy metals from the spreading contaminate plume. Utah rejected this offer and stressed that, given the tentative knowledge of the plume's content, boundary, and migration, the State could not conclude the settlement would satisfy all public health concerns.

Subsequent negotiations split the issues of natural resources damages and costs of remediation. Utah, Kennecott and the United States Environmental Protection Agency (EPA) negotiated an Agreement in Principle toward future cleanup and response costs associated with

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[1] *Utah v. Kennecott Corp.*, 801 F. Supp. 553 (D. Utah 1992).

remediating the Kennecott mining operation contamination.[2] The Agreement expressly disclaimed any effect on Utah's settlement of natural resources damage claims.

With the current proposal, in exchange for monetary recovery of $12 million, Utah agreed to release Kennecott from (1) all damages to surface or groundwater in a defined mining impact area, and (2) injunctive relief or response costs associated with plume remediation. The release was limited by a reopener provision, reserving Utah's right to seek additional recovery if the contamination was discovered to be greater than anticipated. The release also expressly preserved potential claims by third parties.

After a period of public comment, the trial court declined to approve the proposed settlement and ordered an evidentiary hearing. The District moved to intervene as a matter of right. The trial court denied this motion but granted permissive intervention for the limited purposes of participating in discovery and evidentiary hearings. Reviewing the proposed consent decree for a settlement that was " 'reasonable, fair, and consistent with the purposes that CERCLA is intended to serve,' " the trial court concluded the proposal was deficient. *Kennecott*, 801 F. Supp. at 567 (citation omitted). Accordingly, the trial court denied approval of the proposed consent decree. *Id.* at 572. Instead of attending a scheduled case management conference, both Utah and Kennecott separately appealed

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[2] More recently, the EPA announced the three parties jointly decided not to pursue the comprehensive cleanup proposal embodied in the Agreement in Principle. U.S. EPA Press Release (Aug. 27, 1993).

the trial court's order of denial. The District, a permissive intervenor, cross-appealed the denial of intervention as a matter of right.

After consolidating the appeals, we asked the parties to file memorandum briefs on the issue of jurisdiction pursuant to 10th Cir. R. 27.2.2. Before us is a motion by the District to dismiss the Utah and Kennecott appeals for lack of a "final appealable order" upon which to base 28 U.S.C. § 1291 jurisdiction.[3]

## DISCUSSION

Title 28 U.S.C. § 1291 provides "jurisdiction of appeals from all final decisions of the district courts of the United States." Historically, a "final decision" is a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945); *see Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275, 108 S.Ct. 1133, 1136, 99 L.Ed.2d 296 (1988). In the instant case, an order denying a motion to approve and enter a consent decree is not a decision on the merits that ends the litigation. Rather, the district court's order ensures that litigation will continue in the district court. Appellants Utah and Kennecott concede as much and argue the trial court's order is immediately appealable under various exceptions to the finality requirement. In

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[3] No party has moved for trial court certification under 28 U.S.C § 1292(b), nor sought a writ of mandamus, 28 U.S.C. § 1651(a), on their respective issues.

particular, Appellants contend jurisdiction is proper under (1) the collateral order exception to § 1291, (2) the pragmatic finality doctrine, or (3) the § 1292(a)(1) statutory exception, an order with the practical effect of granting or denying injunctive relief.[4]

## I

The Supreme Court, beginning with *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), has interpreted § 1291 to permit an appeal of a nonfinal order if an order falls within the "narrow exception to the normal application of the final judgment rule, which has come to be known as the collateral order doctrine." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S.Ct. 1494, 1498, 103 L.Ed.2d 879 (1989). To meet the *Cohen* exception an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978). Unless all three requirements are met, jurisdiction is not available under the collateral order doctrine. *Gulfstream*, 485 U.S. at 276,

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[4] The District has stated it will withdraw its cross-appeal in the event we deny jurisdiction to the appeals of Utah and Kennecott. For this reason, we do not analyze our jurisdiction to review an order granting permissive intervention but denying intervention of right. We note that, should the District fail to withdraw its appeal, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987), would require a denial of jurisdiction as well.

108 S.Ct. at 1136-37. The trial court's denial of the proposed consent decree does not satisfy either the first or second prongs.

A

To first satisfy the *Cohen* doctrine, the trial court's denial of the consent decree must conclusively determine the parties' ability to settle their claims. Orders that are "inherently tentative" are contrasted with those expected to be the final word on the subject addressed. *See Gulfstream*, 485 U.S. at 277-78, 108 S.Ct. at 1137-38 (rejecting collateral order review of a denial of a motion to stay as inherently tentative); *Coopers & Lybrand*, 437 U.S. at 469 & n.11, 98 S.Ct. at 2458 & n.11 (holding the collateral order exception does not apply to a pretrial order denying class certification because the order is subject to revision prior to a decision on the merits). Inherently tentative orders are those "to which some revision might reasonably be expected in the ordinary course of litigation." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 n.14, 103 S.Ct. 927, 935 n.14, 74 L.Ed.2d 765 (1983). Utah and Kennecott argue the district court conclusively determined the parties' ability to settle by rejecting the technical premises underlying the settlement.

Although noting a conflict in the circuits, the Supreme Court, in *Carson v. American Brands, Inc.*, 450 U.S. 79, 82-83 nn.6 & 7, 101 S.Ct. 993, 996 nn.6 & 7, 67 L.Ed.2d 59 (1981), declined to decide whether an appeal under the collateral order exception was proper for denials of consent decrees. At least one federal circuit has

ruled a district court's refusal to enter a consent decree is not appealable under § 1291, *see Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978), while another has decided such orders are appealable, *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912, 91 S.Ct. 879, 880, 27 L.Ed.2d 811 (1971).[5] Other circuits simply reject collateral order jurisdiction in dicta. *See Donovan v. Robbins*, 752 F.2d 1170, 1172 (7th Cir. 1985) (refusal to approve consent decree is "classic example of a nonfinal order"); *New York v. Dairylea Coop. Inc.*, 698 F.2d 567, 570 n.10 (2d Cir. 1983) (approving of appellant's decision not to raise collateral order grounds, stating the *Cohen* exception "is to be kept within narrow bounds"); *Carson v. American Brands, Inc.*, 606 F.2d 420, 423-24 (4th Cir. 1979) (approving of *Seigal* as an analogous case though dismissing on § 1292(a)(1) grounds), *rev'd on other grounds*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981). We conclude the better reasoned rule finds a denial of a settlement does not conclusively determine the parties' ability to settle.

Similar to the denial of a motion to stay in *Gulfstream* and the denial of class certification in *Coopers & Lybrand*, denial of an offer of settlement is commonly open to revision by the trial court prior to a final judgment on the merits. In this case, the parties are free to continue with renewed settlement efforts and further proceedings to secure court approval. Although the trial court concluded

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[5] The persuasive authority of *Norman* is negligible. Subsequent to *Carson*, the Ninth Circuit disavowed its prior decision and determined that *Norman* had been overruled by *Carson*. *EEOC v. Pan American World Airways*, 796 F.2d 314, 318 n.7 (9th Cir. 1986), *cert. denied*, 479 U.S. 1030, 107 S.Ct. 874, 93 L.Ed.2d 829 (1987).

that Utah and Kennecott have not yet met their burden of substantive fairness under CERCLA, the trial court did not foreclose future proposed consent decrees.

The Appellants contend even though the trial court may not have expressly barred further negotiation the order impliedly did so by attacking the underlying technical premises of the settlement. In particular, Utah and Kennecott assert the order requires them to undertake additional technical studies and include in the consent decree injunctive provisions requiring Kennecott to protect and restore injured ground water. This argument reads too much into the trial court's order and too little into the doctrinal requirements of the *Cohen* exception.

The proper inquiry is whether the trial court is less likely to revise its prior denial as new settlement proposals are offered, not whether the parties feel discouraged and less likely to continue with settlement negotiations. Orders that are inherently tentative characteristically allow or invite reconsideration on the basis of express procedural requirements or, in common experience, are regularly reconsidered. *See* 15A Charles A. Wright et al., Federal Practice and Procedure § 3911.1, at 375 (1992). Commonly, settlements may be offered during the final hearings on the merits. The trial court's order contains no limitations on the court's ability to reconsider future proposals or the initial order denying the proposed consent decree. Appellants have no right to an unfair consent decree under CERCLA, even if the unfair terms are underlying "technical premises." The trial court's order does no more than permit Appellants to propose a new consent decree within the bounds of substantive

fairness. The order does not conclusively determine the ability of the parties to settle.

B

Utah and Kennecott next argue, since the parties lost the right to settle on the specific terms of the proposed consent decree, they lost an important right that cannot be vindicated effectively after the trial has concluded. Because we recently held a broad and unbounded "right not to be tried" is no grounds for immediate appeal, Appellants fail to satisfy the second *Cohen* requirement. *See Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir.), *cert. granted*, ___ U.S. ___, 114 S.Ct. 379, 126 L.Ed.2d 329 (1993).[6] Although Utah and Kennecott contend the lost right to settle satisfies the third *Cohen* prong, we have held the question of an "important issue" – part of the second *Cohen* prong – is the appropriate analysis in

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[6] The Supreme Court's recent grant of certiorari in this case will likely resolve the circuits' diverging treatment of pretrial orders refusing to enforce previously granted settlements. *Compare Desktop Direct* (rejecting a broad reading of a right not to go to trial); *Transtech Indus., Inc. v. A & Z Septic Clean*, 5 F.3d 51 (3d Cir. 1993) (same), *petition for cert. filed*, 62 USLW 3429 (Dec. 16, 1993) (No. 93-960), *with Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir.) (granting jurisdiction to review a denial of enforcement of a settlement on grounds of a right not to go to trial), *cert. denied*, ___ U.S. ___, 113 S. Ct. 412, 121 L.Ed.2d 336 (1992); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) (same); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989) (same), *cert. denied*, 498 U.S. 865, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990). Our adherence to *Desktop Direct* in this section does not affect our earlier conclusion that Appellants have not satisfied the first *Cohen* prong.

this context. *Id.* at 758. The original formulation by the *Cohen* Court examined whether the "decision [fell into] that small class . . . too important to be denied review." 337 U.S. at 546, 69 S.Ct. at 1225-26; *see Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 503, 109 S.Ct. 1976, 1980, 104 L.Ed.2d 548 (1989) (Scalia, J., concurring) (a right not to be tried, even if unreviewable, must be sufficiently important to overcome the policies militating against interlocutory appeals).

The Supreme Court has cautioned courts "not to play word games with the concept of a 'right not to be tried.' " *Midland Asphalt*, 489 U.S. at 801, 109 S.Ct. at 1499. "[I]n some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524, 108 S.Ct. 1945, 1950, 100 L.Ed.2d 517 (1988). The mere possibility that an erroneous ruling at the trial level may result in additional litigation is not sufficient to set aside the finality requirement imposed by Congress. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436, 105 S.Ct. 2757, 2764, 86 L.Ed.2d 340 (1985).

The Appellants in *Desktop Direct* sought review of an order vacating a prior dismissal and rescinding a settlement formerly accepted by the trial court. We rejected the jurisdictional importance of a so-called "right not to be tried" absent a constitutional or statutory basis. *Desktop Direct*, 993 F.2d at 760. The Supreme Court's narrow reading of the collateral order doctrine reveals only one situation important enough – qualified immunity for a public official defendant – to allow an interlocutory appeal in the absence of a constitutional or statutory guarantee. In dismissing the appeal, we concluded the

*Cohen* doctrine should not be "expanded without compelling justification." *Id.* In the case at hand, Utah and Kennecott do not point to a right of review under CERCLA or other statutory or constitutional grounds that would require appellate review of a denied consent decree. The bare desire of Utah and Kennecott to avoid trial is not "important" enough to justify ignoring the § 1291 prerequisite of finality.

Requiring a constitutional or statutory basis for a "right not to go to trial" is sensible. Without clarity in the application of exceptions, the finality doctrine becomes riddled and ineffective. Repeatedly, the Court and commentators encourage the use of statutory exceptions in the face of efforts to stretch the collateral order doctrine. *See Van Cauwenberghe*, 486 U. S. at 529-30, 108 S.Ct. at 1953-54 (conclusion to deny collateral order appeal "fortified by the availability of interlocutory review" under § 1292(b)); *Coopers & Lybrand*, 437 U.S. at 474, 98 S.Ct. at 2461 (principal vice of "death knell" doctrine is circumvention of proper use of § 1292(b)); 16 Wright et al., *supra* § 3929, at 137-38 (vigorous use of § 1292(b) to limit the expansion of other appealability concepts reduces ambiguity that could lead to unnecessary appeals).

Reinforcing the need for definition in appellate review, Congress has recently increased Supreme Court rulemaking authority to define the scope of interlocutory and other nonfinal appeals. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650 § 315, 104 Stat. 5089, 5115 (codified as amended at 28 U.S.C.A. § 2072(c) (Supp. 1993)) (power to define "final" for the purposes of appeal under § 1291); Federal Courts Administration Act of 1992, Pub. L. No. 102-572 § 101, 106 Stat. 4506, 4506 (codified as

amended at 28 U.S.C.A. § 1292(e) (Supp. 1993)) (power to prescribe new rules for interlocutory appeals not otherwise provided in § 1292).

An obvious statutory basis for appeal in the context of avoiding unnecessary litigation is § 1292(b) certification. A primary purpose of § 1292(b) is to provide an opportunity to review an order when an immediate appeal would "materially advance the ultimate termination of the litigation." S. Rep. No. 2434, 85th Cong., 2d Sess. 1 (1958) (hereinafter S. Rep. 2434), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5255; *see* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292 (b)*, 88 Harv. L. Rev. 607, 609-11 (1975) (avoidance of wasted trial court time is sole purpose of § 1292(b)). A report by a Tenth Circuit committee addressing the same problem found:

> Our recommendation is founded upon the premise that the enlargement of the right to appeal should be limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action.

S. Rep. 2434, *supra*, 1958 U.S.C.C.A.N. at 5262 (appendix to the Senate report, submitted without dissent from other circuits). The requirement of district court certification is equally imperative, however, as a procedural screen to avoid a flood of fruitless petitions invoked contrary to the purpose of § 1292(b). *Id.*

Utah and Kennecott seek to expand the *Cohen* doctrine. They claim without immediate appeal they will forever lose the opportunity to avoid the costs and risks of trial and protracted litigation. Despite the potential

accuracy of this assertion, a broadly worded rule allowing review of denied settlements under the *Cohen* doctrine would burden appellate courts with the threat of successive appeals and interfere intolerably with the discretion of trial courts. We decline to adopt such a rule in the absence of constitutional or congressional intent. The denial order is not appealable under the collateral order exception.

## II

Utah and Kennecott next contend this court's "practical rather than technical construction" of § 1291 finality is broad enough to include their appeal. The doctrine has lived a checkered life in both our court and the United States Supreme Court, but finds its current incarnation in *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984).[7] Even where jurisdiction under the *Cohen* exception is unavailable, a practical construction of § 1291 may generate

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[7] The "practical, rather than a technical" approach was announced in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964), but the case was purportedly limited to its facts in *Coopers & Lybrand*, 437 U.S. at 477 n.30, 98 S.Ct. at 2462 n.30 ("If *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance"). Accordingly, this circuit disavowed the practical finality concept in light of the *Coopers & Lybrand* decision. *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1253 (10th Cir. 1979), *rev'd on other grounds sub. nom., Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980). The *Gillespie* decision reappeared, however, in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277-79 & n.7, 100 S.Ct. 1673, 1675-76 & n.7, 64 L.Ed.2d 284 (1980), and, four years later, practical finality was revived in *Bender*.

jurisdiction through a subjective and ad hoc balancing of the interests of the parties against the policies of an unambiguous finality rule. *See Boughton v. Cotter Corp.*, 10 F.3d 746, 751-52 (10th Cir. 1993) (citing 15A Wright et al., *supra* § 3913, at 464). "The critical inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review." *Bender*, 744 F.2d at 1427.

Since *Bender* we have repeatedly stressed a narrow reading of the rule. *See Boughton*, 10 F.3d at 752 (*Bender* and its progeny must be narrowly construed and invoked only in truly "unique instances" in order to preserve the vitality of § 1291); *Quinn v. CGR*, 828 F.2d 1463, 1467 (10th Cir. 1987) (*Bender* must be applied only in the "most exceptional circumstances.") The case at hand is neither unique nor exceptional. Although Utah and Kennecott raise an unsettled question of law – the standard for a trial court's review of a proposed CERCLA consent decree – the only real peril to the Appellants is the cost of extraneous litigation. The magnitude of this interest alone does not overcome the policies of a finality requirement. *See* 15A Wright et al., *supra* § 3913, at 473 (cost of a wasted proceeding does not justify immediate appeal). The order denying Appellants' proposed consent decree does not fall within the narrow scope of the *Bender* exception.

## III

Utah and Kennecott lastly contend the order is appealable as an interlocutory order that grants or denies injunctive relief. *See* 28 U.S.C. § 1292(a)(1). Generally, two strands of analysis have developed for § 1292(a)(1)

appeals. The first applies to orders ruling on express motions for injunctive relief and the second applies to orders with the "practical effect" of granting or refusing an injunction. *MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978, 982 (10th Cir. 1992) (citing *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989)). An interlocutory order expressly denying or granting an injunction fits squarely within the plain language of § 1292(a)(1) and need not make the additional showings required in the second strand of analysis. *Tri-State Generation*, 874 F.2d at 1351. Utah and Kennecott acknowledge that no express motion for injunctive relief is pending, and focus their argument on the strand recognizing the appeal of orders with the "practical effect" of granting or denying injunctive relief.

In *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), the Court examined an appeal from an order refusing to approve a class settlement and proposed consent decree to a Title VII claim of racial discrimination. The settlement would have required the employer to prospectively give hiring and seniority preferences to black employees. Even though the order did not specifically deny an injunction, the Court found the denial of inherently prospective relief had the "practical effect" of refusing an injunction. *Id.* at 83, 101 S.Ct. at 996. For appellate jurisdiction, *Carson* requires the challenged order have (1) "the practical effect of refusing [or granting] an injunction," (2) threaten a " 'serious, perhaps irreparable, consequence,' " and be (3) " 'effectually challenged' " only by immediate appeal. *Id.* at 84, 101 S.Ct. at 996-97 (citation omitted); *United States v. Colorado*, 937 F.2d 505, 507-08 (10th Cir. 1991).

Utah and Kennecott cannot sustain the first requirement. Missing from the consent decree is any equitable or prospective relief, injunctive or otherwise. The Appellants erroneously state the order has the substantive effect of granting an injunction because it "mandates inclusion of a covenant to protect." *See United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986) (where the district court conditioned entry of a consent decree on inclusion of specific court-defined terms, jurisdiction under § 1292(a)(1) proper to review the order). A careful reading of the order shows only the court's analysis of deficiencies in the settlement.[8] The order does not affirmatively demand the inclusion of specific terms in subsequent consent decree proposals. Hence, the order is not appealable under the § 1292(a)(1) statutory exception as an order granting or denying an injunction.

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[8] The proposed Consent Decree also does not address what will have to be done to manage and contain the existing contaminated waters, such as pumping water or other measures designed to "protect" uncontaminated waters from the damaged resource. In this regard, the proposed Consent Decree contains no provision requiring measures to be taken to minimize future expansion of the existing plumes, or to assure that the contamination will not spread beyond the MIA.

801 F. Supp. at 570 (footnote omitted).

## CONCLUSION

Denial of Utah and Kennecott's proposed settlement of CERCLA natural resource damages is not appealable as a *Cohen* collateral order, a § 1292(a)(1) interlocutory order, or under the pragmatic finality doctrine. Consequently, we grant the District's motion to dismiss for lack of jurisdiction.

**DISMISSED.**

## APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

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THE STATE OF UTAH, By and Through the
UTAH STATE DEPARTMENT OF HEALTH, Plaintiff,

v.

KENNECOTT CORPORATION, Defendant.

SALT LAKE COUNTY WATER CONSERVANCY
DISTRICT, Intervenor.

Civil No. 86-0902G

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MEMORANDUM DECISION AND ORDER

[Entered September 3, 1992]

This matter is before the court on the joint motion of plaintiff, the State of Utah, and defendant, Kennecott Corporation, for approval of a proposed Consent Decree relating to a negotiated monetary settlement for damages to the State's interest in ground waters in an area within Salt Lake County, Utah. The proposed Consent Decree would settle the State's claim for natural resources damage under Section 107 of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. 9601, *et seq.*[1]

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[1] References hereafter are to the Transcript and exhibits introduced at hearings before the court March 23-30 and May 14, 1992.

# I. BACKGROUND FACTS

## A. Kennecott's Five-Year Hydrogeologic Study

In 1983, Kennecott undertook a five-year hydrogeologic study to assess surface and ground water conditions in a 216 square mile area affected by mining and milling operations in the Bingham Mining District. Officials of the State of Utah and Salt Lake County were consulted and informally participated in the study through advisory groups. On October 4, 1983, Kennecott submitted ground water monitoring data to the State which indicated significant ground water contamination from the Kennecott operations. In December 1983, the State requested additional information and investigation, and continued to monitor the study. After Phases I and II of the five-year study had been completed in 1985, Kennecott, the State of Utah and Salt Lake County entered into a Memorandum of Agreement dated June 3, 1985, to formalize participation of the environmental health departments of the concerned State and local governments. (Exh. P-10.) Among other things, the agreement called for completion of the five year study with annual reports and development of a final Environmental Impact Assessment (EIA). On March 15, 1990, a draft of an EIA was submitted by Kennecott (Exh. P-28), but a final EIA as required by the June 3, 1985 Memorandum of Agreement has never been completed.

B. State Claim and Lawsuit for Natural Resources Damage

On July 31, 1986, the State filed a Notice of Claim for Natural Resource Damages under section 107 of CERCLA in the amount of $129 million dollars. The damage figure was based upon present and anticipated injury to 59,406 – 109,215 acre feet of ground water in the affected area over a ten to twenty year period. In a transmittal letter to Kennecott, Kenneth L. Alkema, Director of the State Division of Environmental Health, took the position that Kennecott should be given the opportunity to complete its ongoing hydrogeologic study and "to conduct a comprehensive resource damage assessment," but that in order to preserve its rights under CERCLA, and to prevent expiration of the statute of limitations, the claim was being filed by the State and would be followed up with a lawsuit. (Exh. P-41.) On October 3, 1986, the State filed the pending lawsuit against Kennecott seeking, among other things, recovery pursuant to Section 107(a)(4)(c) of CERCLA for alleged damage to State ground water natural resources.

Immediately after the lawsuit was filed, this court granted a motion to stay all proceedings so that the parties could pursue and complete the five year study, and later continued the stay pending settlement negotiations.

C. Kennecott's Experts

In 1987 Kennecott contracted with Dames & Moore, an environmental consulting firm in Denver, Colorado, to prepare a computer-generated ground water model to

simulate past, present and future conditions of the affected ground water in order to project future movement of the contaminated plumes which had been identified. After the five year study was completed, Kennecott retained an expert hydrologist, Adrian Brown, of Adrian Brown Consultants (ABC) Denver, Colorado, to provide additional data. ABC drilled nine new wells for purposes of analysis, and reevaluated the five year study data.

D. Kennecott Offer of Settlement

In August 1990, Kennecott presented an offer of settlement to the State which envisioned exchange of water rights valued at about $2 million dollars for the natural resource damage, plus providing about $100 million worth of remediation work. The Kennecott proposal involved:

- Kennecott undertaking remedial actions aimed at curtailing potential sources of groundwater pollution;
- Kennecott undertaking actions to remediate the heavy metals plume;
- Kennecott assigning water rights to the State as replacement for ground water containing elevated levels of sulfates and heavy metals;
- The State dismissing the lawsuit with prejudice. (Exh. P-44 at 2-4.)

The remedial action proposed by Kennecott involved drilling very deep wells below the low pH or heavy metals plume (area of contamination characterized by low pH materials or heavy metals) and pumping the contaminated water down through the uncontaminated

soil, attenuating the metals and raising the pH. (Trans. Vol. I Pt. 2 at 179.)

E. State's Evaluation of the Kennecott Offer

The State looked to its own staff at the Utah Department of Environmental Health, environmental health personnel at Salt Lake City – County, and experts it hired to evaluate the Kennecott offer. The principal expert concerning natural resources damages was RCG/Hagler, Bailly, Inc. of Boulder, Colorado, which organization supplied a substantial "Preliminary Assessment of Natural Resource Damages Associated with Kennecott Mining Operations in the Great Salt Lake Valley" dated December 20, 1990 ("Hagler report") (Exh. P-44.) Dr. Douglas James at the Utah State University was hired to evaluate the Hagler report, and Dr. Upmanu Lall, an Associate Professor at Utah State University, was hired to review the Kennecott proposal and to estimate the "safe annual yield" of the underground waters in the affected area. Dr. Hong of the University of Utah also was hired to evaluate Kennecott's settlement offer.

The Hagler report was never finalized, but it set forth much information and a proposed course of action which would have identified more fully damages suffered and to be suffered by the State as a result of the contamination, as well as alternatives for remediation.[2] The report

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[2] The Hagler report set forth the following pertinent to damages determination:

> [T]here are several factors to indicate that the damage estimates might be underestimated. First, we *have not*

stressed that the heavy metals plume where there is much contamination presents a dynamic and spreading problem rather than a static situation.[3] As to the potential

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*incorporated past damages*, to the extent that contamination has already affected welfare in the valley (net of Kennecott's past efforts to provide deeper wells to impacted users, etc.). These losses accrued to households who had their well supplies tainted, and may also include foregone increases in property values due to potential inhibitions on increased residential development in that part of the valley. Second, the *water resource values* are based on transactions that are unlikely to have fully taken into account the recent recognition of *water scarcity in the valley*. Third, the estimated groundwater damages only pertain to the contaminated waters, and do not include damages that are likely to arise due to institutional efforts to manage the *plume's future growth and movement* through reducing allowable pumping rates at permitted wells along and beyond the edges of the plume. Finally, the damage estimates do not include values for *injuries other than groundwater contamination*.

* * *

[T]he value of these damages depends on the quantity of water impacted, and the value of the damages appears to range between *$283 to $1429 for each acre foot of safe annual yield* impacted (and may be as high as *$2162 per acre foot* if one considers outright replacement). (emphasis added.)

[3] The Hagler report called the following to the attention of the State:

It must be recalled that the contaminant plume acts in a dynamic rather than a static manner. This dynamic behavior has two important ramifications. First, *future advection and dispersion of the plume would involve increasing the volume of groundwater affected*

quantity of ground water which may be regarded as damaged, the report states:

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(and, thus, proximate damages). Theoretically, one could calculate the maximum possible extent of damages (in the future) by estimating the total mass of contaminant present in the aquifer, and dividing it by the volume of water needed to dilute that mass to the desired threshold concentration (e.g., 500 mg/1 for sulfates).

A secondary consideration associated with a dynamic plume involves the *institutional, management, and energy costs required to minimize future expansion of the plume.* Historically, the main influence on the contaminant plume appears to have been hydrogeologic. The leading edge of the contaminated water has moved down-gradient towards the Jordan River. . . . Assuming other factors remain constant, it appears that the plume will eventually flow, as a result of the hydraulic gradient, up through the confining layer into the Jordan River. . . .

The main institutional element associated with the plume is the *administration of well pumping* from the principal aquifer throughout the Salt Lake Valley. Based on the number of perfected and approved well permits for the principal aquifer, *it appears that the aquifer is over-appropriated.* Pumping associated with a certain number of all of these well permits may change the direction and steepness of the hydraulic gradient, thereby allowing *the plume to spread in different directions and at different rates than at present. . . .*

It appears that when considering the dynamics of the plume, there is a significant hidden administrative cost over and above any natural resource cost being pondered. Thus, *if administrative steps are needed to contain the plume, this cost should be considered as part of any damage claim.* (emphasis added.)

> To estimate total groundwater damages, the above range of values ($283/AF to $1429/AF) was multiplied by the annual yield represented by the plume. Kennecott's estimate of 8,000 AF as a safe annual yield relies on an overly limited interpretation of the plume (delineating the plume at 1000 mg/1 of sulfates, rather than the 400 to 500 mg/1 range that the U.S. EPA has stated it intends to propose for health-based drinking water standards). With a larger plume so defined, and with more appropriate interpretations of the concept of safe annual yield, *the impacted yield may be as high as 100,000 AF/year.* (emphasis added.)

Estimated damages to the State were set forth in the Hagler report using three approaches – restoration, replacement and loss of value. Estimated damages values based on these methods alone, apart from other damage considerations noted in the report, ranged from $2.3 million to $216 million, depending upon the quantity of ground water contamination and the method of valuation. It was also noted in the Hagler report that one "appreciable negative attribute" of the proposed settlement was that it "use[d] dismissal with prejudice to preclude future claims for natural resource damages other than those associated with groundwater plume remediation," and that it did not cover other damages, including "potential losses of intrinsic values." (Exh. P-44 at pp. 2-5.)

A "Preliminary Assessment Plan" envisioned in the Hagler report apparently was never ordered by the State. It was also pointed out in the Hagler report that "more refined estimates of natural resources damage would require *substantial additional information,*" particularly as

to alternative estimates of plume size. (Exh. P-44 at p. 6-2) (emphasis added.) Hagler has not been authorized by the State to provide such additional information.

Dr. Lall, the State's expert ground water hydrologist at Utah State University, considered two areas for safe annual yield analysis, which areas had been identified by Dames & Moore. The first was an area of 216 square miles, 15.75 miles in the east-west direction and 13.75 miles in the north-south direction, which covered contamination from the Kennecott site within " 'the entire area of known and potential contaminant effects related to the mining and leaching activities,' and relevant boundary fluxes." (Exh. P-47 – Attachment 1, p. 2.) The other area identified was 77.5 square miles, "a smaller area that bounds the area with wells that had one or more drinking water standard violations." (*Id.*) In this smaller area Dr. Lall estimated the safe annual yield to be 25,000 to 40,000 acre feet. In a letter to the State dated February 6, 1991, Dr. Lall pointed out that the *"safe yield issue is incontrovertibly tied to the remediation issue"* and said that *"the appropriate area to consider for yield analysis depends on the outcome of the remediation process."* (Exh. P-47) (emphasis added.) On the assumption that the likelihood of success of the proposed remediation is low, Dr. Lall opined that "the area to be considered for safe yield impact should reflect the present and *potential* extent of contamination." (Exh. P-47 – Attachment 1, p. 1.)

Dr. Douglas James of Utah State University, an expert engaged by the State to evaluate the Hagler report, submitted a preliminary review on January 15, 1991. (Exh. P-45.) He noted that RCG/Hagler Bailly, Inc. had discussed "environmental and social impacts . . . from the

depletion of a groundwater resource" and damages to the State apart from loss of the "safe annual yield" value. (*Id.*) Dr. James also stressed that *loss of the underground aquifer* for "subsurface storage as a reserve during drought or after a climate change" was a major element of damage. (*Id.*)

In March 1991, Terry D. Sadler, the Director of Environmental Health for Salt Lake City-County, in a letter to Mr. Alkema, expressed grave concerns as to the Kennecott settlement proposal and called for completion of the final Environmental Impact Assessment required by the terms of the Memorandum of Agreement entered into by the State, Salt Lake County and Kennecott in 1985. (Exh. I-34.) Mr. Sadler evaluated the Kennecott offer thusly:

> Removing just the metals from the contaminated plume while leaving the water unusable to Salt Lake County residents is unacceptable. Additional consideration must be given to the sulphate plume where treatment is logical in relation to public health and should be part of remediation.
>
> * * *
>
> As we emphasized earlier, it is inappropriate and contrary to good public health practices to limit cleanup levels to only CERCLA parameters. The aquifer east of the evaporation ponds has been contaminated, private wells have been rendered useless, the plume outline has not been defined, plume migration has not been evaluated, and the public has been put at risk because some private well users are drinking water containing metals and other contaminates

> in amounts that exceed the drinking water standards. Again, in no case should the decision be no further action. (Exh. I-34 at 3.)

After due consideration and review from September 1990 to March 1991, the State rejected the Kennecott settlement proposal.

F. Negotiations and Agreement for Separate Settlement of Natural Resources Damage Claim

In rejecting the Kennecott proposal, the State determined that remedial action issues should be analyzed in greater detail and pursued with the approval and cooperation of the Environmental Protection Agency (EPA). Mr. Alkema testified at the hearing that ultimate remediation "probably would and will cost in excess of several hundred million dollars." (Trans. Vol. I Pt. 2 at 185.) Negotiations involving EPA, the Utah Department of Environmental Quality [DEQ] and Kennecott began in February 1991 to establish a "framework for the parties to negotiate a legally enforceable consent decree." This resulted in an Agreement in Principle which was executed on about April 1, 1992. (Attached to State of Utah's Posthearing Brief, Exh. A.) The agreement covers all Kennecott property located in and around the Oquirrh mountains, excluding active mining operations in Barneys Canyon, and calls for Kennecott to pay response costs which will be incurred by EPA and DEQ in cleaning up the contamination at or from Kennecott's property. *The natural resource damage claim in the case at bar will not be affected by the future clean up consent decree.* However, the Agreement in Principle does specify that entry of the

proposed Consent Decree in the case now before this court

> in no way affects or prejudices the United States' ability to require Kennecott to perform response actions under CERCLA (or recover costs for response actions implemented by the EPA), including but not limited to those for ground water, and that such settlement will not impair whatever rights, if any, federal trustees may have to bring a claim for resources within their trusteeship. (*Id.* at 4.)

During the period March to July 1991 the State and Kennecott negotiated settlement of the State's natural resource damage claim apart from remediation. Coincidentally during this same time frame, on April 5, 1991, the Utah State Engineer released the "Salt Lake Valley Interim Ground-Water Management Plan" (Interim Plan) which identified nine water quality zones in the Salt Lake Valley, and set out the maximum annual withdrawals from each zone. (Exh. P-l.) The water quality zones set forth in the Interim Plan were based upon data and maps developed by the USGS. (Trans. Vol. I Pt. 2 at 53-64.) The Interim Plan identified area eight as having a maximum withdrawal rate of 13,000 acre feet per year. Thereafter, the State and Kennecott determined that area eight of the Interim Plan embraced the apparent area in which Kennecott's operations have caused underground water contamination. Accordingly, this area was adopted as the appropriate area within which damages should be calculated, and was designated as the "Mining Impact Area" (MIA). In this regard, the State and Kennecott also reached agreement that the "safe annual yield" of the aquifer within the MIA essentially was the same as the

maximum withdrawal rate for area eight as identified in the Interim Plan, 13,000 acre feet per year. Accordingly, the $11.7 million dollar settlement figure which was arrived at primarily was based upon an estimate of the market value of water rights per acre foot within the MIA multiplied by the 13,000 acre feet per year "safe annual yield" estimate. Litigation costs, legal uncertainties such as causation, as well as present availability and use of the settlement money were factors also taken into account.

The State's decision to settle was based upon its determination that the contaminated ground water within the MIA cannot feasibly be remediated. Mr. Alkema did not insist that Kennecott should finalize the Environmental Impact Statement with a full discussion of alternatives because he had determined that only natural remediation would be feasible. He so testified at the hearing:

> [I]t was my conclusion that practically the only thing that will work and is feasible is to allow the aquifer to self-attenuate, to let it essentially be cleaned up by the soil as the contaminated water moves through it.

(Trans. Vol. II Pt. 1 at 5-6.) This process of natural remediation will take hundreds of years to eliminate the acid plume and approximately a thousand years to remove the sulfate plume.[4]

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[4] Trans. Vol. III Pt. 2 at 59-61.

G. Proposed Consent Decree

On or about July 31, 1991 a proposed Consent Decree was tendered to the court which envisioned settlement of the State's natural resource damage claim for $11.7 million. Kennecott and the State assume in the Consent Decree that the safe annual yield of underground waters within the entire MIA has been permanently lost because of contamination and that the estimated 13,000 acre feet safe annual yield must be permanently replaced.[5] Another assumption is that the sulfate plume and the heavy metals or low pH plume will continue to be confined within the MIA. For purposes of settlement, it was also agreed that the waters lost should be valued at the same market value as waters of drinking water quality. In exchange for $11.7 million, the proposed Consent Decree provides that the State releases and covenants not to sue Kennecott as follows:

> 1) regarding *damages for injury to, destruction of, or loss of surface water or groundwater* in the Mining Impact Area under federal law, State law, or common law including the cost of assessing such injury, destruction or loss; and 2) for administrative or injunctive relief or *response costs in connection with any groundwater plume remediation* (as that term is commonly understood, not as defined by statute or regulation) in

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[5] Kennecott asserts that some water in the area is being used for "irrigation and other purposes" and that "the contaminated plume has had little impact on use of the ground water within the Mining Impact Area. Kennecott owns most of the rights to the ground water within the Mining Impact Area and continues to pump water from the aquifer for industrial and other purposes." (Kennecott's Prehearing Brief, at 14.)

> the Mining Impact Area under CERCLA, the State Hazardous Substances Mitigation Act (Utah Code Ann. Section 19-6-301 *et seq.*), or under common law. The term "groundwater remediation" does not include remediation or control of sources that have contributed, or may contribute, to contamination of surface or groundwater. (emphasis added.)

The Consent Decree also contains a reopener provision in the form of a reservation of the State's right to institute proceedings against Kennecott for damages "that are of a type that was unknown, or of an order of magnitude greater than was known to the State at the date of entry of this Decree. . . . " as well as the right to seek ground water plume remediation based on conditions "that are of a type unknown, or of an order of magnitude greater than was known to the State at the date of entry of this Decree. . . . " Finally, the Consent Decree preserves potential claims by third parties, and excludes whatever claims third parties might have:

> The Decree does not bind third parties who are not parties to this Decree, and the Decree does not resolve or bar claims, if any, of third parties, including, but not limited to, claims by political subdivisions of the State for interference with the quantity or quality of their water rights; provided, however, that nothing in the Decree affects Kennecott's rights or defenses against third parties with respect to such claims.

Following a public comment period relative to the proposed Consent Decree, on October 25, 1991 the court heard extensive argument by counsel for the State and Kennecott in which both parties urged court approval of

the proposed settlement and opposed intervention by the Salt Lake City Water Conservancy District (SLCWCD). The court also heard argument by SLCWCD in favor of intervention. The court declined approval of the settlement and proposed Consent Decree at that time and ordered an evidentiary hearing on the following issues in order to determine the merits of the settlement:

1) The nature and extent of natural resource damage which has been caused by Kennecott;

2) Whether it is feasible to restore or remediate the contamination caused by Kennecott within the identified area;

3) How the damages which have occurred to the natural resources may be measured, whether on the basis of restoration, replacement, market value or otherwise;

4) The nature and extent of SLCWCD's interest in underground waters which may be impaired by reason of implementation of the Proposed Consent Decree Order dated November 18, 1992.

SLCWCD was granted permissive intervention to participate in discovery and to present evidence at the hearing.

H. Evidentiary Hearing

A week-long evidentiary hearing was held from March 23, 1992 to March 30, 1992, and on May 15, 1992, at which various exhibits and extensive testimony were presented to the court by the State, Kennecott and the SLCWCD. The evidence as related to the issues identified by

the court and other issues regarded by the court of particular import included the following:

1. Nature and Extent of Natural Resource Damage Caused by Kennecott

Mr. Alkema testified on behalf of the State that the contamination formed two plumes, a low pH or heavy metals plume "approximately 4 square miles in surface area," and a sulphate plume "approximately 17 square miles in area." (Trans. Vol. I Pt. 2 at 142.) At the present time the contaminated plumes are contained within the 40 square mile area identified at the hearing as the "Mining Impact Area" (MIA). The MIA happens to be almost identical in size with water area eight which was identified by the State Engineer in the Salt Lake Valley Interim Ground-Water Management Plan, released in April 1991 (Exh. P-1.)

Mr. Adrian Brown of Adrian Brown Consultants testified on behalf of Kennecott that assuming source controls are implemented he did not "believe it [the low pH plume] will ever leave the Mining Impact Area." (Trans. Vol. III Pt. 2 at 40.) According to Mr. Brown, the MIA has "a very great amount of neutralizing material" such that "the acid will be destroyed" by natural materials. (*Id.*) Mr. Brown testified that given the approximately "billion tons" of neutralizing calcium carbonate in the MIA which acts to neutralize the low pH, there are enough neutralizing agents to "take care of the plume in perpetuity," "providing there is some level of source control." (*Id.*) However, Mr. Brown also testified that natural attenuation and remediation will take hundreds of years of

movement through soils. In this regard, Mr. Brown testified that natural remediation of the sulfate plume would take "in the order of a thousand years" (Trans. Vol. III Pt. 2 at 61) provided there is "source control from Kennecott's mining operations." (*Id.* at 60.) With regard to the acid plume, he estimated that if Kennecott implements various source controls it will take approximately 512 years for the low pH plume to naturally remediate. (*Id.* at 59-60.)

SLCWCD presented evidence that the area of damage even now extends well beyond the MIA based upon ground water well readings which indicate contamination of various kinds beyond "background" levels. (Trans. Vol. I Pt. 2 at 20; Trans. Vol. V Pt. 1 at 14, 15; Trans. Vol. IV Pt. 2 at 95-97; Trans. Vol. IV Pt. 2 at 104-05.) In this regard, Mr. Kaliser, of Bruce N. Kaliser & Associates, a consulting practitioner in engineering geology and ground water hydrogeology, testified that the area of contamination was larger than the 40 square miles identified as the MIA, and said that the area of contamination is more accurately described as an area with a wide transitional zone rather than distinguished by a single bright line. (Trans. Vol. IV Pt. 2 at 102.) According to Mr. Kaliser the area which has been impacted by Kennecott's mining operation is "54-1/2 square miles for the interior limit of the transition zone. For the exterior or outside limit it's 70 square miles," with a volume of acre feet affected by Kennecott's mining operations, of 2,398,000 acre-feet for the interior limit and 3,024,000 acre-feet for the exterior limit of the

transition zone. (*Id.* at 110.) Mr. Kaliser presented evidence of contamination outside the MIA based on drinking water standards.[6] He also presented data relative to the erratic and complex geologic formations in the area and probable extent of the plumes.[7]

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[6] Mr. Kaliser identified data which indicated concentrations exceeding drinking water standards, and testified:

> For that five-year period, . . . this volume contains the actual figures, the values of the constituents that exceed--those values that exceed drinking water standards for each one of the following constituents: chlorides, total dissolved solids, sulfates, aluminum, manganese, iron, lead, selenium, copper, silver, cadmium, zinc. . . . Here I've indicated in a synopsis of the extent to which these substances have been found in excess of the drinking water standards. For example, total dissolved solids exceeded the standards in 179 wells, and they exceeded them up to 6,330 percent of the standard. I have provided that information for each one of the constituents. (Trans. Vol. IV Pt. 2 at 64.)

These conclusions were challenged by Kennecott as misleading and based upon insufficient data.

[7] Mr. Kaliser testified that there were additional geologic features, not considered by Kennecott, that "contributed to the extent of the plume" such as "the presence of sinkholes" and "faults in the valley fill or the alluvium." (Trans. Vol. IV Pt. 2 at 52.) "Faults in the valley fill could modify the flow of groundwater and redirect or channel it." (*Id.*) "Sinkholes are open voids of vertical extent indicating open channels flow and become most significant." (*Id.*) Mr. Kaliser also noted the existence of "volcanic rock" in the area and that its porous nature "permits the passage of groundwater through it more readily than either the bedrock under it or the alluvium over it in many cases. So that's a potential pathway [to the aquifer.]" (*Id.* at 61.)

Evidence was presented to the effect that not all of the waters within the MIA are contaminated,[8] and that Kennecott cannot necessarily be identified as having caused all of the contamination.[9] However, it was acknowledged that contaminated substances attributable

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[8] Mr. Alkema testified that "[t]here are areas within the . . . mining impact area which are not yet contaminated by the plume that Kennecott has created . . . . So there are areas that could be used within the plume and in fact are being used within the plume at the present time." (Trans. Vol. II Pt. 1 at 27.)

[9] Evidence was presented that mining companies other than Kennecott could have contributed to part of the damage, and that contamination from natural processes not directly related to mining activities could have caused some of the damage. (Trans. Vol. I Pt. 1 at 5-9; Trans. Vol. I Pt. 2 at 9; Exh. P-28 at 5-9.) Mr. Fred Nelson, counsel for the State, represented that "the history of the mining operations in this area, the story would go back a [sic] 150 years." (Trans. Vol. 1 Pt. 1 at 6.) In this regard, Mr. Alkema testified:

> There have been . . . significant mining activities historically here since 1860. And there are along Bingham Creek . . . mine tailings that are all along here. There are the Anaconda tailings that are on this side of the creek that were deposited shortly after the turn of the century. As mining proceeded and they developed newer techniques or better techniques for protecting the environment as well as for operations, instead of just dumping the tailings down the creek they began building tailings ponds. . . . Also another section of tailings are the Lark tailings, again were deposited after the turn of the century, they were reworked a little bit later in the '60s and '70s, . . . You can also see along here various tunnels that were used to mine the ore body in the past, the Bingham Tunnel, the Mascotte Tunnel, and the Butterfield Tunnel. Those were used by persons in especially historic times. . . . (Trans. Vol. I Pt. 2 at 116-17.)

to Kennecott operations have been released before and after 1980, in a continuing manner. (Trans. Vol. I Pt. 2 at 103, 116-118; Exh. P-28 at 8; Exh. P-44.)

It appears to the court that the area of contamination is not now nor in the future will continue to be neatly contained within water area eight which was identified in the Utah State Engineer's Interim Ground-Water Management Plan and adopted by the State and Kennecott as the Mining Impact Area. There is no physical barrier to prevent the contaminated waters from spreading or moving. Because of the dynamic nature of the plumes in question, it is likely that the area of contamination will shift, spread out and continue to grow larger.

2. Determination Regarding the Infeasibility of Restoration

The State and Kennecott presented evidence that it would be onerous and extremely costly to pump and treat the heavy metals within the low pH plume. (Trans. Vol. III Pt. 2 at 182.) Mr. Alkema testified on behalf of the State that pumping the ground water and cleaning it would be unworkable. (Trans. Vol. I Pt. 2 at 187-88.) He commented,

> [i]t would in my view not be feasible to do that [pump the water out of the ground to clean it]. The reasons are that it's an extremely large plume of contamination many miles in area; the volume is also very large. That the complexity of geology also makes it impossible to technically be able to remove the contamination because of variation and kinds of material, the rate with which the water can flow through the

> geology, the soil varies extremely from 50 to as high as 4,500 feet per year.

(Trans. Vol. II Pt. 1 at 2-3.) Mr. Alkema also testified that he believed that restoration could not succeed, and that likely any remediation of the contaminated waters "will cost in excess of several hundred million dollars." (Trans. Vol. I Pt. 2 at 185.)

SLCWCD presented expert testimony to the effect that reverse osmosis would be feasible to remediate a portion of the plume. (Trans. Vol. V Pt. 2 at 18.) Mr. William Surratt, an environmental engineer with Camp, Dresser & McKee, an international environmental firm, testified that "a reverse osmosis process can be used to treat the area of contamination which has been referred to as the sulfate plume." (*Id.* at 18-19.) With regard to treatment of the heavy metals or low pH plume Mr. Surratt testified that it was "much more difficult and much more expensive [than the sulfate plume]" but that "it can be done. *It depends on how much money you want to spend.*" (*Id.* at 21) (emphasis added.) Although Mr. Surratt had not conducted any testing and his analysis focused on feasibility, he testified that it would cost "at least 30 million" to build a reverse osmosis treatment plant that would treat the water from the sulfate and heavy metals plumes. (*Id.* at 21.)

Dr. Eric Tiepel, a chemical engineer with Resource Technologies Group, an engineering firm specializing in hazardous waste remediation, groundwater remediation, and mining related problems, testified on behalf of Kennecott that "all of these proposals [for remediation of the plumes] are feasible," and that "anything is feasible in

terms of water treatment" but he noted "the results of this would be very impractical." (Trans. Vol. III Pt. 2 at 198.) Dr. Tiepel explained that "[w]e do not believe that it is feasible to treat directly the metals plume area without the consumptive use of practically all the water and the generation of very high quantities of sludges and brines as a consequence of that treatment." (*Id.* at 182.) He further testified that "[m]ost people who look at hazardous waste remediation systems typically do not use reverse osmosis as the primary treatment process, simply because it's very difficult to dispose of the brines because the brine volumes are generally very large as compared to the clean water that's produced." (*Id.* at 187.) With respect to the remediation scenarios proposed by SLC-WCD, Mr. Tiepel testified that 35 to 75 percent of the water would be lost in the pretreatment process. (*Id.* at 191-92.)

Mr. Alkema testified at the hearing, consistent with his prior conclusion in connection with the proposed settlement, that remediation "[is] really not technically feasible to do in anybody's lifetime" (Trans. Vol. II Pt. 1 at 44) and that "we still don't believe there is, a way to actually clean up that aquifer." (Trans. Vol. I Pt. 2 at 164.)[10] He testified that the final EIA which Kennecott was to prepare was never finalized because

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[10] Mr. Alkema testified that "it was my conclusion that practically the only thing that will work and is feasible is to allow the aquifer to self-attenuate, to let it essentially be cleaned up by the soil as the contaminated water moves through it." (Trans. Vol. II Pt. 1 at 6.)

> [w]hat we would envision substituting for that, would be a remedial investigation feasibility study report that would have EPA's involvement and blessing and input. So that would be what I envision would take the place of the final Environmental Impact Assessment. We couldn't get to that . . . without bringing in the Environmental Protection Agency into it. (*Id.* at 167.)

In this regard Mr. Alkema testified that even though the State would not require such remediation, the EPA might do so: "even if we assume worst case and collect the damage that we think is appropriate for the public loss that has occurred, and EPA finds in their look at this that the aquifer can be restored, the restoration would still have to take place under their authority, under a remedial action proposal." (*Id.* at 163-64.) In the meantime, Mr. Alkema identified source remediation as the State's number one and top priority. (*Id.* at 154.)

The State ultimately may be proven correct in having concluded that it would be infeasible to restore the contaminated waters. However, such finding may well be in error because the State failed to require completion of studies which were begun, and failed to identify and fully discuss possible alternatives for plume remediation and restoration.

3. Source Remediation

Eliminating the sources of contamination was identified by Mr. Alkema as the State's "number one priority." (Trans. Vol. I Pt. 2 at 154.)[11] It was brought out at the

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[11] Mr. Alkema noted "even with the elimination of the sources of contamination, the plume is so extensive that there's

hearing that leach collection system upgrades, intercepting leachate by the installation of trenches, the lining and cementing of ditches, and piping some of the material are some of the efforts which have been instituted by Kennecott in order to reduce the amount of leachate contaminating the ground water. (*Id.* at 155.) Mr. Alkema testified, however, that this process is not complete and "*a lot more yet needs to be done* to eliminate the sources all the way around the south end of the waste dumps up Butterfield Canyon, all of the drainages need to be intercepted properly and ensured that the leachate is not getting into the groundwater." (*Id.* at 155-56) (emphasis added.) Mr. Alkema also testified about other actions taken by Kennecott to reduce sources of contamination in the area such as double lining of the small reservoir, removal of sludges from the large reservoir, reducing the volume of the large reservoir (to avoid overspill), construction of structures to intercept the good quality water and divert it away from the Bingham drainage, and installation of barrier wells above the large reservoir to intercept underground flow from Bingham Creek. (*Id.* at 157-60.) Mr. Alkema opined that these source remediation efforts are "*just the beginning of what needs to be done*" (*Id.* at 160) (emphasis added), and that although some of the source remediation efforts have been "initiated but are not complete, *others need to be taken. . . .* " (Trans. Vol. II Pt. 1 at 8) (emphasis added.)

Mr. Adrian Brown testified that despite the remedial measures in effect now, contamination from Kennecott

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a good chance that much of that water is, from the State's perspective, could not be used." (Trans. Vol. I Pt. 2 at 163.)

sources continues to occur. In this respect, the large Bingham reservoir and the leach collection systems leak, and approximately 50 percent of the waters from the Bingham Canyon underflow are not being recovered by the barrier wells. (Trans. Vol. III Pt. 2 at 82-83.) Mr. Bruce Kaliser testified on behalf of the Intervenors that the following are currently contributing to contamination of the ground water: the large Bingham Reservoir, the small Bingham reservoir, the wash area along the Bingham Creek drainage, the Bingham Canyon underflow, the Northern east side dumps, the Southeast side dumps, the Yosemite dumps, the Lark dumps and the evaporation ponds. (Trans. Vol. IV Pt. 2 at 90-101.)

It appears to the court that while substantial source remediation has occurred, much more needs to be done. Yet, there is no specific requirement for such set forth in the proposed Consent Decree.

4. Need to Manage and Control Existing Contaminated Plumes

Mr. Alkema testified that "it is very difficult" to identify exactly where the plume is and where it's going. (Trans. Vol. I Pt. 2 at 144.) Mr. Alkema further testified that he understood at the time the Consent Decree was signed that "if nothing was done it [the area of contamination] was going to continue to grow" and that "even with just source elimination it was still going to grow almost as much as without source elimination." (Trans. Vol. II Pt. 2 at 83.) Mr. Alkema then opined that "the size of the plume will continue to grow for more than 100 years, much more than 100 years probably." (*Id.*)

No evidence was presented by the State or Kennecott at the hearing as to what should be done in order to prevent the plumes from contaminating waters outside the MIA. Nor was evidence presented by any party as to whether uncontaminated areas within the MIA can be protected from contamination. Also, no evidence was presented regarding what should be done to manage and contain the existing plumes, or the cost thereof.

Assuming that the contaminated plumes cannot be remediated, it appears to the court that the area of contamination will continue to grow and expand, and that active institutional management will be required to minimize and contain the problem. This is true now and will continue to be the case even if adequate source remediation occurs.

5. Measure of Damages

Mr. Alkema testified that the State evaluated the following methods of damage assessment: loss of value,[12] cost of treatment, and replacement. (Trans. Vol. II Pt. 1 at 33, 36, 39.) With regard to the loss of value method, Mr. Alkema characterized it as "a market value method" that "looks at the value of the resource strictly as a sale of water rights versus what that overall impact may be to the public." (*Id.* at 35.) As to the cost of treatment method, Mr. Alkema said that it involved the cost of "pumping water from the mining impact area and treating it and then using it as a drinking water supply." (*Id.*

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[12] The "loss of value" method of damage assessment is also sometimes referred to as the "loss of use" method.

at 36.) Mr. Alkema testified about the drawbacks related to this method of treatment:

> "[i]t does not take into account that much of the water is already being used for purposes that don't require that level of treatment [drinking water]. It also really *did not take into account the feasibility* of this remedy. It was strictly a text-book kind of analysis where we looked at cost of treatment for a certain kind of water and just pulled that out and used it. *It was not a feasibility analysis in any way* as to whether this might or might not work and then it also deals with one of the tough issues as to what is the right, what is the damage because of the injury to the resource, to the public as a whole, and what is the damage to that resource that impacts the private water right holder." (*Id.* at 38) (emphasis added.)

Mr. Alkema testified that the cost of replacement method of damage involves "purchasing water rights for water of comparable quality that would have been there." (*Id.* at 39.) However, Mr. Alkema noted a fundamental difficulty associated with the replacement cost method:

> [i]t's really not true replacement in that if you take water from Bear River or from out in Central Utah Project, you're really not replacing water, you're only moving that water from one place to the other and that was a concern we had that although it is acceptable as a replacement kind of alternative, it really does not replace water. (*Id.* at 40.)

He also noted that this type of damages analysis "assumes that there . . . is a complete loss of the resource that has been damaged or injured, . . . (and) it also

provides . . . a damage to the individual water right holder. . . . " (*Id.*)

It was apparent at the hearing that the State utilized the loss of value method based upon market value in determining damages for purposes of settlement. In this regard, Mr. Alkema testified that in determining the settlement figure, "there were two factors, major factors that we considered, one was the amount of water in the terms of safe annual yield that was impacted and the other was the value of that water." (Trans. Vol. II Pt. 1 at 23.) Evidence was presented at the hearing as to the market value of an acre foot of water. (Trans. Vol. IV Pt. 1 at 32; Trans. Vol. II Pt. 1 at 29.) Kennecott and the State also presented evidence that the settlement agreed upon represents a fair market price for the safe annual yield of 13,000 acre feet of water within the MIA. (Trans. Vol. IV Pt. 1 at 32, 47.) In this regard, Dr. Charles J. Ciccetti, an economist employed by Arthur Anderson Economic Consulting and by the University of Southern California, testified on behalf of Kennecott that the price arrived at was "higher than it should have been." (*Id.* at 47.)

It is clear that the loss of value or loss of use method of evaluation was regarded by the State as strictly a market value method of computing damages. In this regard, neither Kennecott nor the State presented evidence of damages suffered by the State for loss of use other than estimated market value of the 13,000 acre feet. (*Id.* at 21-23.) No amounts were presented as to existence and option values or damages. Existence value is derived from the satisfaction of simply knowing that a natural resource exists, even if no use occurs. Option value is the value associated with an individual's desire to preserve

the option to use the natural resource, even if it is not currently being used. In this regard, Dr. Ciccetti, Kennecott's expert, testified:

> [We] have a situation here where the injured resource is groundwater so the typical categories of damages that are related to recreation, to scenic and esthetic [sic] amenities, to the kinds of things that in most other natural resource damage claims cases are very important and involve a lot of time and effort. In this situation, *we just don't have those categories of damage,* so the lost services, that is, the lost utility to people that is relevant is the ability to use the groundwater for either municipal, commercial, or industrial or irrigation uses, in other words its value is limited to removing it from below the surface and bringing it up and putting it into some productive or consumptive use when it's needed and when it would be cost effective to do so.

(*Id.* at 21) (emphasis added.)

Evidence was presented indicating both a scarcity and an over abundance of water in the Salt Lake valley. (Trans. Vol. IV Pt. 1 at 29; Exh. D-2, p. 2; Exh. I-44, p. ES-2.) However, water scarcity in this arid part of the country was not adequately developed in terms of impact upon the existence value of the aquifer.

It appears to the court that the State prematurely utilized the "loss of value" measure of damages since it had not developed sufficient facts to justify its conclusion that the contaminated plumes could not be remediated. In any event, it appears that the loss of value method was not correctly applied In this regard, the State purported

to utilize the loss of value method in determining damages to its ground water resources, but it actually utilized a strictly market value approach, based upon water quantity measured by safe annual yield. Other use and nonuse values apart from market value, including option and existence values, were regarded as inapplicable. Failure to take into account damages such as loss of the aquifer apart from market value of the quantity of water the State determined to be contaminated resulted in an inadequate assessment of damages under the loss of use method.

6. Nature and Extent of SLCWCD's Interest

Evidence was presented that at least one well is controlled by SLCWCD within the MIA. Mr. Bay, Chief Engineer of the Salt Lake Water Conservancy District, testified that "I found one [a water right belonging to SLCWCD] that lies within nearly the center of the plume area and several around the perimeter or within the areas that's defined here." (Trans. Vol. VI Pt. 1 at 9.) The District owns other wells in the area to which Mr. Bay testified:

> One is located within 200 feet of the mining impact area, the other two are located within 1600 and 1700 feet, very close and those that I find would draw water from that area. The others are water right numbers 57-8817 located right here, (indicating), and right close to that is 57-2426. I determined that the state engineer would find that these are so close that they would draw water from area 8. (*Id.* at 11.)

The Sierra Club and the Mineral Policy Center were granted leave as Amicus Curiae to submit a memorandum of

law following the evidentiary hearing, and the parties and intervenor were permitted to file post hearing briefs. On May 14, 1992, in an all day session, the court heard extensive argument on the ultimate issue, i.e., whether the court should approve the Consent Decree as being just, fair and reasonable and consistent with the purposes CERCLA is intended to serve, and the matter was taken under advisement. Now being fully advised, the court makes and enters its Memorandum Decision and Order.

## II. LEGAL ANALYSIS

### A. Standard of Review

The trial court's function when reviewing proposed consent decrees forged under CERCLA is to "satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." *U.S. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990). In this regard, the "statute's overreaching [sic] principles" are "accountability, the desirability of an unsullied environment and promptness of response activities." *Id.* at 91. Fairness in the CERCLA settlement context has both procedural and substantive components.[13] Clean up and remediation is the

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[13] The First Circuit pointed out that procedural fairness evaluates the negotiating process and attempts to "gauge its candor, openness, and bargaining balance." *Cannons*, 899 F.2d at 86. In this case it appears that procedural fairness has been satisfied.

Substantive fairness requires that "a party bear the cost of the harm for which it is legally responsible." *Id.* at 87. It is "roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties

fundamental purpose of CERCLA.[14]

B. Settlements in Which Federal Regulations are Not Followed

In this case the State chose not to follow the existing federal regulations in making its determinations.[15] It was not required to do so, but failure to do so eliminates the presumption of validity and correctness which otherwise the State would enjoy.[16] This is important in a case such

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according to rational estimates of how much harm each PRP has done." *Id.*

[14] "Congress, in enacting CERCLA, intended to provide a vehicle for cleaning up and preserving the environment from the evils of improperly disposed of hazardous substances. . . ." *Artesian Water Co. v. Gov't of New Castle County*, 659 F.Supp. 1269, 1286 (D.Del. 1987) (quoting *Artesian* I, 605 F.Supp. at 1357 n. 10.)

[15] *See* 51 Fed. Reg. 27,674 (1986) (codified at 43 C.F.R. §§ 11.10-11.93 (1987). Among other things the regulations require the Trustee to determine whether there has been an injury to the natural resources (43 C.F.R. § 11.61 - .64), to quantify the amount of natural resources damaged (43 C.F.R. § 11.70 - .73), and to assess the dollar amount of damages to be paid (43 C.F.R. § 11.80 - .84). At the hearing Kenneth L. Alkema, the trustee appointed by the Governor of the State of Utah and Director of the State Division of Environmental Health, testified that "[w]e did not follow the procedural requirements that are spoken of in the regulation." (Trans. Vol. II Pt. 1 at 30, 31.) Mr. Alkema further testified that "he did not conduct a formal Department of Interior Part B assessment as outlined in the regulations." (*Id* at 30-31.)

[16] 42 U.S.C. 9607(f)(2)(C) provides: "Any determination or assessment of damages to natural resources for the purposes of this chapter . . . made by a Federal or State trustee in accordance

as this where the State has chosen to settle its damage claim *before* the remediation process. This "cart before the horse" approach is unusual as noted by the court in *In re Acushnet River and New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F.Supp. 1019, 1035 (D. Mass 1989):

> . . . customarily, natural resource damages settlements follow or are contemporaneous with cleanup settlements. This is so because, customarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment. As a residue of the cleanup action, in effect, they are thus not generally settled prior to a cleanup settlement.[17]

C. Deficiencies in Proposed Settlement

The court has determined from a preponderance of the evidence at the hearing that the settlement contained within the proposed Consent decree is deficient in at least

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with the regulation promulgated under section 9651 of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee . . . . " 43 C.F.R. 11.10 provides: "The assessment procedures set forth in this part are not mandatory. However, they must be used by Federal or State natural resource trustees in order to obtain the rebuttable presumption contained in section 107(f)(C)(2) of CERCLA."

[17] In *Acushnet River*, the court ultimately approved settlement of the natural resource damages claim prior to and independent of the clean up and remediation process, but imposed conditions including a requirement to "protect and restore." *Acushnet*, 712 F.Supp at 1038.

three major respects. *First*, lack of sufficient foundation for the State's determination that its ground water natural resource cannot be restored.[18] *Second*, failure to require substantial protection of State natural resources from further contamination. *Third*, failure to apply the proper measure of damages, which resulted in failure adequately to take into account the extent of the damages the State has suffered and will suffer as a result of the contamination. Failure to develop sufficient factual foundation to support the State's determination that contaminated ground waters cannot be restored requires that the proposed Consent Decree be rejected for failure to demonstrate that the remedial purposes CERCLA was intended to achieve cannot be achieved. Failure to mandate containment and management of the contaminated waters, and failure to require further source control does not comport with the CERCLA requirement to "*protect* and restore." Inadequate consideration of damages requires that the proposed Consent Decree be rejected for failure to satisfy substantive fairness under CERCLA.

1. State's Determination Not to Require Restoration of its Contaminated Ground Waters

In this case the State determined that it is not feasible to restore the contaminated ground water within the so-called "Mining Impact Area." However, the State failed to require Kennecott to complete a final Environmental

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[18] "Restoration" can be achieved by cleaning up and thus restoring a damaged resource, or by replacing or acquiring the equivalent of the damaged resource. See footnote 26, *infra*.

Impact Assessment which would have set forth and assessed possible remedial alternatives. When the 1990 Kennecott settlement offer was submitted, the State properly engaged experts to evaluate the offer. The State rejected the Kennecott plan for plume remediation, but remediation studies and evaluations called for by RCG/Hagler were not ordered to be completed. (Exh. P-44 at 5-1.) In Dr. Lall's review of the settlement offer he made it plain that analysis of the natural resources damage claim was "inextricably tied to the remediation issue," but he was not asked to complete his work. (Exh. P-47.) As a result, alternative possibilities for remediation which may have been suggested were not identified. In this regard, at the hearing of this matter, SLCWCD presented a plan for partial remediation based upon reverse osmosis. Apparently that possibility, which was not fully developed at the hearing, was not analyzed by the State prior to its determination that remediation was not feasible. Also, it is not clear that the State's determination of the "safe annual yield" was fully analyzed.[19]

This court concludes that the State and Kennecott failed to demonstrate by a preponderance of evidence that restoration and plume remediation is not feasible in justification of the State's determination not to require

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[19] It is questionable whether 13,000 acre feet is an accurate estimate of the safe annual yield of contaminated waters within the MIA. Mr. Alkema testified at the hearing that, "[i]f your decision was not to enter this Consent Decree, we would definitely *complete* his (Dr. Lall's) report, *get more information*, and do whatever we needed to prove what safe annual yield was. In our mind it still is and will probably continue to be the 13,000 acre feet." (Trans. Vol. II Pt. 2 at 147) (emphasis added.)

such. Failure to develop sufficient factual foundation to support the State's determination that contaminated ground waters cannot be remediated requires that the proposed Consent Decree be rejected for failure to demonstrate that the remedial purposes CERCLA was intended to achieve cannot be achieved.

2. Failure to Require Source Control or Management and Containment of Existing Contaminated Waters

Section 9622(j)(2) of CERCLA requires a federal trustee, when settling a natural resource damage claim that contains a covenant not to sue for natural resource damages, to require the potentially responsible party (PRP) to commit to "actions necessary to protect and restore the natural resources damaged by such release or such threatened release." In this regard, 42 U.S.C. § 9622(j)(2) provides:

> An agreement under this section may contain a covenant not to sue under section 9607(a)(4)(C) of this title for damages to natural resources under the trusteeship of the United States resulting from the release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant *if the potentially responsible party agrees to undertake appropriate action necessary to protect and restore the natural resources damages by such release or threatened release of hazardous substances.* (emphasis added.)

In the *Acushnet River* case, the court ruled under CERCLA section 9622(j) that natural resources damages settlements which do not require clean up but which contain a covenant not to sue (on the part of the government) – must include provisions assuring that the responsible party will take actions necessary to "protect and restore" the injured natural resources. *Acushnet*, 712 F.Supp. at 1036.[20]

In this case, even though the State determined that it would be infeasible to "restore" the contaminated natural resource, it could have required a covenant to "protect" by way of source control as well as containment and management of the existing contaminated plumes.[21]

However, the proposed Consent Decree contains no such protective requirements.

The proposed Consent Decree fails to require protection against further contamination by way of source control. Although the State does not waive its right to require source control, the Consent Decree fails to impose any substantial duties upon Kennecott in that regard. It was

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[20] The plain language of Section 9622(j)(2) applies only to cases involving a federal trustee, with no corresponding provision applicable to state trusteeships. However, consistent with the purposes of CERCLA, the "protect and restore" mandate should apply to covenants not to sue for natural resource damage settlements that precede clean up whether such involve federal or state trustees.

[21] Such a covenant could have been required by the State as owner of the damaged ground waters. Utah Code Ann. § 73-1-1 provides "[a]ll waters in this state, whether above or under the ground are . . . the property of the public, subject to all existing rights to the use thereof."

demonstrated at the hearing that Kennecott has accomplished some source control,[22] but it was also made clear that much more is needed.[23] Notwithstanding such recognized need, the State has failed to require additional source control measures even though it is apparent that the contaminated plumes are being further contaminated by Kennecott operations.[24]

The proposed Consent Decree also does not address what will have to be done to manage and contain the existing contaminated waters, such as pumping water or other measures designed to "protect" uncontaminated waters from the damaged resource. In this regard, the proposed Consent Decree contains no provision requiring measures to be taken to minimize future expansion of the existing plumes, or to assure that the contamination will not spread beyond the MIA.[25]

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[22] Kennecott has engaged in a number of activities to alleviate sources of contamination including: lining the leach collection system, double lining and installation of a leak detection system in the small reservoir, reducing the level of water in the large Bingham reservoir and lining it, removing sludge from the large Bingham reservoir, and development of a surface water management system to redirect contaminated mine area surface waters to the concentrator. (Trans. Vol. I Pt. 2 at 155-61.)

[23] See discussion on source remediation, pp. 24-26 [pp. 24B-26B], *supra*.

[24] Mr. Alkema testified at the hearing that "contamination continues" and that the "plume continues to grow." (Trans. Vol. II Pt. 2 at 126.)

[25] The proposed Consent Decree does provide for a ground water permit program wherein a ground water discharge permit is required for active operations that have the potential to discharge to ground water. The permit is granted if an applicant

The State and Kennecott did not present a sufficient factual predicate to convince the court that the proposed Consent Decree would be just and fair without a covenant to perform necessary additional source control and to provide for containment and management of the existing contamination. Failure to require containment and management of the contaminated water, and failure to require further source control does not comport with the CERCLA requirement to "*protect* and restore."

3. The State Failed to Assess Damages Adequately

In the landmark case of *State of Ohio v. United States Dep't of Interior*, 880 F.2d 432, 444 (D.C. Cir. 1989), at issue was the Department of Interior's regulations which provided that damages in such actions would equal the lesser of restoration or replacement costs, or diminution in use values. The court rejected the "lesser of" approach and held that CERCLA mandates a distinct preference for restoration costs as the measure of damages.[26] This court adopts and follows the *Ohio* court's rule of law in that respect.

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can demonstrate that all discharges will meet applicable discharge standards. The program involves monitoring, sampling and reporting to ensure that the discharge standards are met. (Trans. Vol. II Pt. 1 at 10-12.) This water permit program will help to prevent the contaminated plumes from growing larger, but does nothing to manage or contain the existing contamination.

[26] The term restoration is commonly used by courts as "shorthand" for "restoring, replacing or acquiring the equivalent of the damaged resource." *See Ohio*, 880 F.2d at 441.

The *Ohio* court also rejected a narrow interpretation of use values contained in DOI's rules which placed extraordinary reliance on market values.[27] The court ordered the DOI to issue a rule "that would permit trustees to derive use values for natural resources by summing up all reliably calculated use values, however measured so long as the trustee does not double count." *Id.* at 464. In this regard, the court held that option and existence values "prima facie, ought to be included in a damage assessment," assuring full compensation for the lost resource. *Id.* While option and existence values may represent " 'passive' use, . . . they nonetheless reflect utility derived by humans from a resource, and thus, *prima facie*, ought to be included in damage assessment." *Id.*[28]

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[27] The *Ohio* court illustrated this point: "[I]magine a hazardous substance spill that kills a rookery of fur seals and destroys a habitat for seabirds at a sealife reserve. The lost use value of the seals and seabird habitat would be measured by the market value of the fur seals' pelts (which would be approximately $15 each) plus the selling price per acre of land comparable in value to that on which the spoiled bird habitat was located. Even if, as likely, the use value turns out to be far less than the cost of restoring the rookery and seabird habitat, it would nonetheless be the only measure of damages eligible for the presumption of recoverability under the Interior rule." *Ohio*, 880 F.2d at 442. The court then went on to say: "[f]rom the bald eagle to the blue whale and snail darter, natural resources have values that are not fully captured by the market system." *Id.* at 462-63.

[28] Very few resources, "such as plants and animals, possess an established economic value." Cross, Frank B., "Natural Resource Damage Valuation," 42 *Vand. L. Rew.* [sic] 269, 307 (1989). When a market does exist, the values ascribed may inadequately value the resource to the public. For instance, recreational sports anglers may find that the presence of fish has higher value or greater utility than commercial fishermen. *Id.*

In this case, having determined that restoration is not feasible, the State turned to loss of value as the sole method of measuring damages. If further study demonstrates that restoration is feasible, the State would be obliged to follow and apply the statutory preference for restoration in assessing costs and damages, unless exceptional circumstances would warrant adoption of a different measure of damages. In this regard, the *Ohio* court did note that a possible exception to restoration could exist where "other considerations—i.e., infeasibility of restoration or grossly disproportionate cost to use value —warrant a different standard." *Id.* at 459. Assuming that this case presents the exception, and that the State would be justified in determining that restoration is not feasible, it appears that the State adopted a too narrow interpretation of use value by equating such with market value only. Manifestly, the settlement amount is based on loss of value which essentially calculates the alleged market value of the safe annual yield within the Mining Impact Area without reference to existence and option values. (Trans. Vol. II Pt. 1 at 23.) The State simply failed to assess the non-consumptive use values of the aquifer, *i.e.*, option and existence values.[29]

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[29] Although the aquifer is unlike most other natural resources such as lakes, eagles or seals which have more obvious existence and option values, its existence value should have been considered in the settlement given the fact that people who live in a desert most likely would assign substantial value in just knowing that an aquifer exists. The Hagler Report (Exh. P-44, at p. ES-2) notes that there is "water scarcity in the valley." There was conflicting testimony at the hearing on this matter, but if true, this would certainly enhance existence value.

It appears to the court that significant additional possible damages such as loss of the aquifer are not provided for in the proposed Consent Decree, even assuming that loss of value ultimately is determined to be the proper standard. Moreover, the State failed to calculate into the settlement the costs of preventing the plumes from spreading and contaminating the remaining unspoiled portion of the aquifer, by pumping water or other methods. In addition, the State did not require that the settlement include the cost of further source control which would at least lessen contamination from continuing on a daily basis. Apparently, the State clings to the possibility of future plume remediation to be ordered by EPA. That possibility is not a justifiable reason for the State to fail to adequately study possible alternatives or to fail to require a covenant to "protect and restore" State owned natural resources. In this regard, the settlement as proposed does not "capture fully all aspects of the loss." *Ohio*, 880 F.2d at 463.

This court concludes that inadequate consideration of damages requires that the proposed Consent Decree be rejected for failure to demonstrate to the court the existence of substantive fairness under CERCLA.

## III. INTERVENTION

Intervention in a CERCLA action is governed by CERCLA § 133(j) and is also subject to Fed. R. Civ. P. 24. A potential intervenor must (1) make a timely application for intervention, (2) have an interest in the subject of the action, (3) be so situated that without intervention the disposition of the action may, as a practical matter, impair

or impede the applicant's ability to protect his interest, and (4) have an interest not adequately protected by the existing parties. *United States v. Mid-State Disposal, Inc.*, 131 F.R.D. 573, 576 (W.D. Wis. 1990). *See also United States v. Bliss*, 132 F.R.D. 58, 59 (E.D. Mo. 1990). If one or more of the above criteria are not met, a party will not qualify for intervention of right, as distinguished from permissive intervention.

In this case, because of the exclusions contained in the Consent Decree preserving rights of third parties to recover for "interference with the quantity and quality of their water rights," adjudication of this action would not necessarily impair or impede the ability of non party third persons to protect their interests. The Consent Decree specifically provides that "the Decree does not resolve or bar claims, if any, of third parties, including, but not limited to, claims by political subdivisions of the State."

Turning to the petition of SLCWCD for intervention, the court has determined that permissive intervention should be granted. The petition of SLCWCD was timely under the circumstances of this case. Only after publication of the proposed Consent Decree did it become apparent that the State and Kennecott were *jointly* advocating settlement pursuant to terms thereof. Other factors to be considered in connection with permissive intervention are:

> the nature and extent of the intervenor's interest, whether the intervention will unduly delay or prejudice the adjudication of the rights of the

> original parties, whether the applicant will benefit by the intervention, whether the intervenor's interests are adequately represented by the other parties, and whether the intervenors will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

*Acushnet*, 712 F.Supp. at 1023. See Rule 24(b)(2) Fed. R. Civ. P. See also *United States Postal System v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978).

After due consideration of the aforesaid factors, this court determines to exercise its discretion and to permit SLCWCD to intervene in this case. SLCWCD is uniquely situated to significantly contribute to the underlying factual and legal issues which have a bearing upon the just and equitable determination of legal questions presented.

Based upon the foregoing, this court concludes that the proposed Consent Decree as written is not just and fair or consistent with the purposes of CERCLA. Accordingly, the application for approval of the proposed Consent Decree is denied.

This case is set for a case management conference on October 23, 1992, at 10:30 a.m. Prior to the conference with the court counsel for the parties are directed to meet and develop a suggested plan for the conduct of discovery pursuant to Fed. R. Civ. P. 26(f). The parties should

file the jointly agreed upon plan with the court by noon on October 16, 1992.

IT IS SO ORDERED.

DATED: September 3rd, 1992.

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

## APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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STATE OF UTAH, By and Through the
UTAH STATE DEPARTMENT OF
HEALTH, Plaintiff-Appellant,

v.

KENNECOTT CORPORATION,
Defendant-Appellant and
Cross-Appellee,

SALT LAKE COUNTY WATER CONSERVANCY
DISTRICT, Intervenor-Appellee and
Cross-Appellant.

Nos. 92-4173, 92-4179 and 92-4180.

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ORDER

Entered March 28, 1994

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Before BALDOCK, McWILLIAMS and BRORBY, Circuit Judges.

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This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

No. 94-147

(2)

Supreme Court, U.S.
FILED
SEP 2 1994
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1994

THE STATE OF UTAH, BY AND THROUGH THE UTAH STATE DEPARTMENT OF HEALTH, and KENNECOTT CORPORATION,

*Petitioners,*

*vs.*

SALT LAKE COUNTY WATER CONSERVANCY DISTRICT,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Does this Court's recent opinion in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994), holding that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders," govern the appealability of a district court's denial of entry of a consent decree proposed by a government trustee.

2. Whether a trustee authorized to assess natural resources damages and seek recovery for such damages on behalf of the public has an "explicit statutory guarantee of immunity from trial" so that the refusal by a district court to enter a consent decree proposed by that trustee presents grounds for an immediate appeal under the collateral order doctrine.

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## INTRODUCTION

The Petition for Certiorari seeks review of a Tenth Circuit Court of Appeals' order denying § 1291 review of a district court's denial of the entry of a proposed consent decree between the State of Utah, acting as trustee on behalf of the public ("Utah") and Kennecott Corporation ("Kennecott") on the grounds that the proposed settlement was not fair and consistent with the purposes that CERCLA is intended to serve.

Neither Utah nor Kennecott moved for the district court's certification under 28 U.S.C. § 1292(b).

In denying jurisdiction, the Tenth Circuit Court of Appeals relied on its earlier opinion in *Desktop Direct, Inc. v. Digital Equipment Corp.*, 993 F.2d 775 (10th Cir. 1993) ("*Desktop*"), which opinion was recently affirmed by this Court in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994) ("*Digital Equipment*"). In *Digital Equipment*, this Court held that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders." 114 S. Ct. at 1994.

Contrary to the argument of Utah and Kennecott, the Petition does not involve the denial of a right "explicitly guaranteed by a particular constitutional or statutory provision." Rather, Petitioners seek to circumvent the finality requirements of § 1291 by erroneously arguing that because CERCLA encourages settlement of claims, it necessarily follows that a trustee appointed pursuant to CERCLA has an "explicit statutory right" to settle on its own negotiated terms and avoid trial. There is no such right.

This Petition does not present a special or important issue, nor is it in conflict with *Digital Equipment* or with decisions of other United States Courts of Appeals. *Digital Equipment* is controlling. The Petition for a Writ of Certiorari should be denied.

## STATUTORY PROVISIONS INVOLVED

A. *28 U.S.C. § 1291* (set forth in Petition for a Writ of Certiorari at 3).

B. *The Comprehensive Environmental Response, Compensation and Liability Act of 1988 ("CERCLA"), 42 U.S.C. § 9607(f), CERCLA § 107(f)* (set forth in full in Appendix A).

## STATEMENT OF THE CASE

### A. Procedural Background

Both Petitioner, State of Utah, as the State CERCLA Trustee designated to act on behalf of the public as trustee of the damaged natural resources, and Petitioner, Kennecott Corporation, sought review by the court below of an order of the federal district court denying a motion to approve and enter a consent decree submitted by the parties. The proposal would have settled the public's claim against Kennecott for natural resource damages under CERCLA § 107(f), 42 U.S.C. § 9607(f).

Utah and Kennecott each filed separate appeals, which were subsequently consolidated, arguing that refusal to enter the proposed consent decree was appealable as a final collateral order under 28 U.S.C. § 1291 because the district court's order (1) conclusively determined Utah's and Kennecott's right not to go to trial, (2) resolved the "important" issue of whether the district court applied an erroneous legal standard in considering entry of the proposed consent decree, and (3) because the order was effectively unreviewable on appeal from a final judgment.

Respondent, Salt Lake County Water Conservancy District ("District"), a political subdivision of the State of Utah and a permissive intervenor in the proceeding below, moved to dismiss the consolidated appeals for lack of jurisdiction. The motion was

granted by the Tenth Circuit, and the Petition for Certiorari followed.

**B. The District Court's Review and Denial of Entry of the Proposed Consent Decree.**

In 1986, Utah, as Trustee, filed CERCLA natural resource damage claims against Kennecott for contamination of ground and surface water in Salt Lake County resulting from Kennecott's and their predecessor corporations' operation of the Bingham Copper Mine in the Salt Lake Valley. The Complaint claimed damages in the approximate amount of $129 million based on the quantity of groundwater believed to be contaminated. *See Utah v. Kennecott,* 801 F. Supp. 553 (D. Utah 1992); Petition for a Writ of Certiorari ("Petition"), at 3B.[1] Kennecott initially offered to settle the claims for assignment of water rights and performance of remediation work valued in excess of $100 million. *Id.* at 4B. Utah rejected this offer on the ground that Utah could not conclude that the settlement would satisfy all public concerns. *Id.* at 3A, 11B.

Following the subsequent negotiations, on July 30, 1991, Utah and Kennecott filed a consent decree with the district court proposing to settle the natural resource damage claim for $11.7 million, plus three hundred thousand dollars for attorney's fees in exchange for a release and covenant not to sue Kennecott for CERCLA response costs or for damages to surface and groundwater in a defined "mining impact area." *Id.* at 14B.

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1. The opinions below are included in the Appendix to the Petition for a Writ of Certiorari. The opinion of the Tenth Circuit, *Utah v. Kennecott,* 14 F.3d 1489 (10th Cir. 1994), is included as Appendix A and the Memorandum Decision and Order of the District Court, *Utah v. Kennecott,* 801 F. Supp. 553 (D. Utah 1992), is included as Appendix B. For the convenience of the Court, this brief contains cites to the pages of the Petition's Appendix when referring to these cases.

The District moved to intervene as a matter of right pursuant to CERCLA § 133(i), 42 U.S.C. § 9633, and opposed entry of the proposed settlement on the ground that it was not consistent with the requirements of CERCLA. After a period of public comment, the district court held a hearing on Petitioners' Motion for Entry of the proposed decree. At the hearing, Petitioners failed to give the court any basis for the settlement and argued that absent evidence of collusion or bad faith the court was required to accept the proposed consent decree. *Utah v. Kennecott,* Case No. C86-902 (D. Utah), Portions of Transcript of October 25, 1991 Hearing (attached hereto as Appendix B) at 4a-8a.

Recognizing its duty to determine whether the proposed consent decree was fair, just and consistent with the statutory mandate, the trial court declined to approve the settlement and ordered an evidentiary hearing to determine the sufficiency of the proposed settlement. The court also granted the District permissive intervention for the purpose of participating in discovery and the evidentiary hearing. Petition at 14B-17B; Transcript of Hearing at 1033.

After six days of hearing, the district court entered its Memorandum Decision and Order ("Order"), concluding that "the proposed Consent Decree as written is not just and fair or consistent with the purposes of CERCLA." *Utah v. Kennecott Corp.,* 801 F. Supp. 553, 572 (D. Utah 1992); Petition at 45B. Accordingly, the court denied approval of the proposed consent decree, and granted the District permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. *Id.* Instead of attending a scheduled case management conference, both Utah and Kennecott appealed.

**C. The Tenth Circuit Found that the Order is Not Immediately Appealable Pursuant to § 1291.**

Petitioners contended that jurisdiction in the Tenth Circuit was proper (1) under the collateral order exception to § 1291, (2) pursuant to the pragmatic finality doctrine of the Tenth Circuit, and (3) because the Order had the practical effect of granting or denying injunctive relief appealable pursuant to § 1291(a)(1). The Tenth Circuit held that the trial court's denial of the proposed consent decree did not satisfy any of the alleged grounds for appellate review and granted the District's motion to dismiss for lack of jurisdiction.[2] *Utah v. Kennecott,* 14 F.3d at 1495-97; Petition at 14A-18A.

In examining the right of immediate appellate review in light of the *Cohen* test, the Tenth Circuit found (1) that the district court's order is not final and does no more than permit Petitioners to propose a new consent decree within the bounds of substantive fairness, to seek reconsideration of the proposed decree, or to litigate the issues on the merits and (2) that Utah and Kennecott could not point to a right of review under CERCLA or any other statutory or constitutional ground that would require immediate appellate review of a denied consent decree. *Utah v. Kennecott,* 14 F.3d at 1493-94, Petition at 9A-10A, 12A.

In their Petition for a Writ of Certiorari, Utah and Kennecott now urge that an unidentified CERCLA provision "which explicitly favors minimizing litigation" creates the necessary "explicit statutory right" to satisfy the "important question" prong of the *Cohen* test. Petitioners argue that this amorphic provision creates a statutory right of a government trustee to settle a natural

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2. In their Petition for a Writ of Certiorari, Petitioners only seek to review the circuit court's denial of jurisdiction pursuant to the collateral order exception to § 1291.

resource damage claim on its own terms to avoid trial.[3]

## SUMMARY OF ARGUMENT

**A. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994), Is Controlling of This Petition. Consistent with That Opinion, This Court Should Deny Petitioners' Request for a Writ of Certiorari.**

This court recently held in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994) ("*Digital Equipment*"), "that an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders" immediately appealable pursuant to § 1291 of the Judicial Code. *Id.* at 1994. This is precisely the issue presented by the present Petition for Certiorari.

The Petition seeks review of the district court's refusal to approve a settlement agreement between Utah and Kennecott and enter a proposed consent decree after the court found that there was not a sufficient factual foundation from which it could find that the proposed decree was fair and consistent with the purposes that CERCLA is intended to serve.

Petitioners state that "[i]f denial of this settlement is not reviewed immediately, then the CERCLA Trustee's right to bring and settle this claim will be infringed with no opportunity to redress." Petition at 22. This argument is nothing more than another version of the "right not to be tried" argument that was expressly rejected by this Court in *Digital Equipment*. As this

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3. Petitioners do not cite to a statutory provision that grants a government trustee the right to obtain a consent decree settling a natural resource damage claim on its own terms. In fact, Petitioners have not included in the "Pertinent Statutory Provision" section of their Petition any CERCLA statutory authority. Petitioners only reference 28 U.S.C. § 1291.

Court has made clear, the right to be trial-free obtained through a settlement agreement, as contrasted with a right grounded on an explicit, statutory or constitutional guarantee of immunity, simply "does not rise to the level of importance needed for recognition under § 1291." *Id.* at 2001.

**B. The Petition Fails to Qualify Under the Collateral Order Exception to the Finality Rule as Enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1941), and Its Progeny.**

*1. Certiorari Should Be Denied Because The Petition Fails To Identify An "Important" Explicit Statutory Or Constitutional Right That Would Supply The Basis For A Collateral Order Appeal.*

In *Digital Equipment,* this Court suggested that nonfinal orders may be immediately appealable where important "statutory and constitutional rights" are irretrievably lost. *Id.* at 2002. However, this Court also explained that the right to be trial-free obtained through a settlement agreement does not rise to the level of importance needed to supply a basis for interlocutory appeal under § 1291. *Id.* at 2001.

In an effort to circumvent the express holding of *Digital Equipment,* Petitioners argue that because one of the parties to the proposed consent decree was a trustee appointed pursuant to CERCLA with authority to seek damages for injury to natural resources, the trustee has "explicit statutory authority" to settle which falls within the narrow exception to the finality rule of § 1291.

CERCLA, like many other federal statutes, provides for a trustee and places in that trustee the responsibility to pursue claims for damages. *See* CERCLA § 107(f), 42 U.S.C. § 9607(f).

CERCLA, however, does not provide and Petitioners have not pointed to an "explicit statutory right or guarantee" which was denied by the trial court's refusal to enter the proposed decree. CERCLA's grant of authority to a natural resource trustee is contained in § 107(f), which provides only that a natural resource trustee may assess damages to natural resources and "shall act on behalf of the public as trustee of such natural resources to recover for such damages." CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1). Other than this provision, CERCLA grants no authority to a natural resource trustee to bring, try or settle claims for natural resource damages.

Authority conferred by CERCLA on a trustee to "recover for such damages" may, by implication, give that trustee authority to file lawsuits, manage litigation and even enter into settlement agreements. However, this implied authority does not create an "explicit statutory right" to settle those claims on the trustee's proposed terms. In fact, the legislative history of CERCLA clearly indicates that Congress expressly intended that CERCLA settlements be subject to challenge and reviewable by federal district courts to insure that settlements would be fair and just to the public and consistent with the purposes of CERCLA.

The right to immunity from trial that Petitioners argue is present in this case must be "explicit" in the statute, not just implicit from a general policy of CERCLA to encourage settlement or the general public policy favoring settlement that is implicit in all litigation, including CERCLA claims. *See Digital Equipment,* 114 S. Ct. at 2002 (This Court was not swayed by what it characterized as Digital's "last-ditch effort" to come within *Cohen's* sense of importance by trying to show that settlements merit collateral order treatment "because they advance the public policy favoring voluntary resolution of disputes.").

*2. The District Court's Order Did Not Resolve an Important Issue Completely Separate from the Merits of the Action.*

To meet the second prong of *Cohen,* the "important question" must also be "completely separate from the merits of the action." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978). The issue raised by Petitioners of whether a trustee has a right to settle a natural resource damages claim is inextricably enmeshed with the merits of the litigation — whether the trustee's proposed consent decree is just, fair and consistent with CERCLA.

*3. Denial of Entry of a Consent Decree Does Not Conclusively Determine the Parties' Ability to Settle Their Claims.*

To satisfy the first prong of the *Cohen* test the district court's denial of the consent decree must conclusively determine the parties' abilities to settle their claims. Orders that are inherently tentative "to which some revision might reasonably be expected in the ordinary course of litigation" do not meet this requirement.

The district court's order denying effect to a proposed consent decree is inherently tentative. The district court determined only that approval of the consent decree required further study and factual support. The Order did not contain any limitations on the court's ability to reconsider future proposals. It does no more than permit Petitioners to propose a new consent decree within the bounds of substantive fairness. *Utah v. Kennecott Corp.,* 14 F.3d at 1494; Petition at 9A-10A.

*4. A Right to Settle and Not to Proceed with Litigation Is Not an Important Right Effectively Unreviewable on Appeal after Judgment.*

Any rights of Utah and Kennecott under their settlement agreement can be adequately vindicated on appeal from a final

judgment. *See Digital Equipment,* 114 S. Ct. at 1996 ("rights under private settlement agreements can be adequately vindicated on appeal from final judgment.").

**C. The Petition Does Not Present an Issue in Conflict Among the Courts of Appeals. The Courts Are in Agreement that a District Court's Refusal to Approve a Proposed Settlement Agreement Is Not Appealable Under 28 U.S.C. § 1291.**

This Petition involves the immediate appealability of a district court's refusal to enter a *proposed* settlement agreement. Petitioners cite to no authority conflicting with the Tenth Circuit's opinion denying § 1291 appealability to the denial of entry of a *proposed* settlement agreement. Courts of Appeals have consistently denied appellate jurisdiction to review the denial of entry of a proposed settlement agreement because review requires inquiry into the merits of the case.

In suggesting a conflict among the circuit courts, Petitioners cite to cases involving refusal to enforce *pre-existing* settlement agreements. Review of an order denying enforceability of a pre-existing settlement does not require an inquiry into the merits of the case. As noted by Petitioners, prior to *Digital Equipment* courts of appeals sometimes did find § 1291 jurisdiction to review a district court's refusal to enforce a pre-existing settlement agreement. However, whatever jurisdictional distinction may have existed between these two lines of cases was resolved by the Supreme Court in *Digital Equipment* which "granted certiorari to resolve this conflict." *Digital Equipment* at 1995.

In *Digital Equipment,* the Supreme Court held that even in the second line of cases, appellate jurisdiction was not available under § 1291. "We hold that an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders." *Id.* at 1994.

**D. Petitioners Have Improperly Raised an Issue in the Petition for Certiorari that Was Not Presented Below.**

This Court has made clear that, although not precluded from doing so, the Court will "not normally decide issues not presented below." *Carlson v. Green*, 446 U.S. 14, 17 (1980). In their Petition for a Writ of Certiorari, Utah and Kennecott ask this Court to consider whether a CERCLA Trustee has a statutory right to settle claims on its own terms and whether this right, if it exists, is "important" as that term is used in the *Cohen* test for determining interlocutory appealability. Petitioner's Brief at 9. This is an issue that the Petitioners did not raise before the Tenth Circuit.

In its brief regarding appellate jurisdiction filed in the court below, Petitioners argued that the central issue in the appeal which allegedly satisfied the "important" requirement of *Cohen* was "the correct standard of review to be applied to a proposed settlement of a natural resource damages claim by a federal district court." This Court found such a claim "patently irrelevant for § 1291 purposes." *Digital Equipment*, 114 S. Ct. at 2000 n. 6.

Petitioners did not argue to the Tenth Circuit that a natural resource trustee has a "statutory" right to settle natural resource claims on its own terms and that the denial of such a right, if it exists, is "important" under *Cohen*. Consequently, this Court should refuse to now consider this issue on the Writ of Certiorari.

## MISSTATEMENTS OF FACT OR LAW SET FORTH IN THE PETITION

1. Petitioners erroneously state that CERCLA provides natural resource trustees with explicit statutory authority to settle claims. *See* Petition at 8 (CERCLA trustee has a right "to bring and settle a claim for natural resource damages."); *Id.* at 10 (natural resource trustee has "exclusive and plenary power to bring, assess,

try and settle claims."); *Id.* (referring to "Trustee's statutory right to settle a natural resource damage claim under CERCLA. . . .") *Id.* at 18 (claiming that the district court interfered with "the CERCLA Trustee's statutory authority to settle this claim."); *Id.* at 21 (referring to "CERCLA Trustee's right to bring and settle a claim for natural resource damages. . . .").

In reality, the only statutory authority granted a natural resource trustee under CERCLA is authority "to assess damages" and "to recover for such damages." CERCLA § 107(f)(1), (2)(B), 42 U.S.C. § 9607(f)(1), (2)(B). Nowhere does CERCLA grant a trustee "exclusive and plenary" authority to "settle" claims for natural resource damages. Petitioners have not and cannot cite to any such statutory authority.

In fact, to settle a natural resource damages claim, a natural resource trustee is required to obtain a consent decree from a district court that has the duty to determine whether the consent decree is "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990).

2. Petitioners misstate the holding of this Court in *Digital Equipment* by suggesting that the holding in that case applied only to private settlement agreements. While it is true that the settlement agreement at issue in *Digital Equipment* was a "private" settlement agreement, the explicit language of this Court's holdings in that case clearly applied to settlement agreements *in general,* including consent decrees, and was not restricted to private settlement agreements. *See, e.g., Digital Equipment,* 114 S. Ct. at 1194 ("We hold that an order denying effect *a settlement agreement* does not come within the narrow ambit of collateral orders") (emphasis added); *Id. at* 2004 ("We accordingly hold that a refusal to enforce *a settlement agreement* claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291.") (emphasis added).

## REASONS FOR DENYING THE WRIT

### I.

### *DIGITAL EQUIPMENT CORP. V. DESKTOP DIRECT, INC.*, 114 S. Ct. 1992 (1994), IS CONTROLLING OF THIS PETITION. CONSISTENT WITH THAT OPINION, THIS COURT SHOULD DENY PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI.

This Court was recently faced with the same issue that is before the Court in the present Petition for a Writ of Certiorari: Whether a district court's refusal to give effect to a settlement agreement between two parties is immediately appealable under 28 U.S.C. § 1291. *See Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994). In *Digital Equipment*, Desktop Direct, Inc. ("Desktop") brought a complaint against Digital Equipment Corporation ("Digital") alleging the unlawful use of a trade name. The two parties subsequently entered into a settlement agreement following which Desktop filed a notice of dismissal.

Several months later, Desktop moved to vacate the dismissal and rescind the settlement agreement, alleging that Digital had made misrepresentations of material facts during settlement negotiations. The district court granted the motion to vacate the dismissal and Digital appealed to the Tenth Circuit. The Tenth Circuit dismissed the appeal for lack of jurisdiction, holding that the district court order was not immediately appealable under the collateral order doctrine. *Id.*, 114 S. Ct. at 1995.

Digital argued to this Court, as do the Petitioners in the present case, that refusal to give effect to a settlement agreement should be immediately appealable on the grounds that such refusal denies settling parties a privately negotiated "right not to be tried." *Id.* at 2001-02. This Court affirmed the Tenth Circuit's dismissal of the appeal, holding that "an order denying effect to a settlement

agreement does not come within the narrow ambit of collateral orders." *Id.* at 1994. This Court expressly dismissed the "right not to be tried" argument, characterizing it as a "losing argument" and holding "that a refusal to endorse a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291. *Id.* at 2002, 2004.

In their Petition, Utah and Kennecott seek review of the failure of the district court to give judicial effect to a settlement agreement between the parties by refusing to approve the agreement and enter a proposed consent decree. As required, the district court reviewed the proposed settlement and found that there was not a sufficient factual foundation from which it could find that the proposed decree was fair and just. In addition, the court did find that the proposed decree in two respects was inconsistent with the purpose and requirements of CERCLA. As a result, the district court could not and would not put its stamp of approval on the proposed consent decree and give effect to the settlement agreement.

Petitioners state that "[i]f denial of this settlement is not reviewed immediately, then the CERCLA Trustee's right to bring and settle this claim will be infringed with no opportunity to redress." Petition at 22. This argument is nothing more than another version of the "right not to be tried" argument that was expressly rejected by this Court in *Digital Equipment.* Recognizing "that Section 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye," this Court explained that there is only a narrow area where such a right may exist, *i.e.*, where there is an "explicit statutory or constitutional guarantee that trial will not occur."[4] *Id.* at 1999. *See*

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4. Very few rights to terminate litigation have been recognized by the Court as sufficiently "important" to support § 1291 appealability. *See, e.g., Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) (state's Eleventh Amendment immunity from suit in federal court); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (denying government qualified

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*also, Lauro Lines S.R.L. v. Chaser,* 490 U.S. 495, 503 (1989) (Scalia J. concurring) (A right not to be tried even if unretrievable, must be sufficiently important to overcome the policies militating against the interlocutory appeals). This Court then went on to explain that the right to be trial-free obtained through a settlement agreement, as contrasted with a right grounded on an explicit, statutory or constitutional guarantee of immunity, simply "does not rise to the level of importance needed for recognition under § 1291." *Digital Equipment,* 114 S. Ct. at 2001.

Petitioners attempt to distinguish the present case from *Digital Equipment,* arguing that *Digital Equipment* applies only to "private settlement agreements." While it is true that the settlement agreement at issue in *Digital Equipment* was a "private" settlement agreement, this Court's holdings in that case clearly applied to settlement agreements *in general,* including consent decrees, and was not restricted to private settlement agreements. *See. e.g., Digital Equipment,* 114 S. Ct. at 1194 ("We hold that an order denying effect *to a settlement agreement* does not come within the narrow ambit of collateral orders") (emphasis added); *Id.* at 2004 ("We accordingly hold that a refusal to enforce *a settlement agreement* claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291.") (emphasis added).

*Digital Equipment* is controlling of this Petition. Under this Court's clear rulings in that case, the district court's refusal to enter the settlement agreement between Utah and Kennecott is not immediately appealable under § 1291.

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immunity from damage suit); *Nixon v. Fitzgerald,* 457 U.S. 731 (1982) (order denying President absolute immunity from suit for civil damages arising from actions taken while President of the United States); *Abney v. United States,* 431 U.S. 651 (1977) (adverse ruling on a Fifth Amendment double jeopardy claim).

## II.

## THE PETITION FAILS TO QUALIFY UNDER THE COLLATERAL ORDER EXCEPTION TO THE FINALITY RULE AS ENUNCIATED IN *COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.*, 337 U.S. 541 (1941), AND ITS PROGENY.

Section 1291 of the Judicial Code confines appeals of right to those from "final decisions of the District Courts." 28 U.S.C. § 1291. For a ruling to be final, it must "end[] the litigation on the merits and leave nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). Further, "the judge must clearly declar[e] his intention in this respect." *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 274 (1991). Denial of entry of a consent decree does not meet the finality requirement. Indeed such an order insures that the litigation will continue. *See Gulfstream Aerospace*, 485 U.S. at 275.

This Court, beginning in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541(1949), recognized a "small class of decisions that are appealable under Section 1291 even though they do not terminate the underlying litigation." This "practical construction" of the Rule entitles a party to appeal not only from a district court decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233 (1945), but also to appeal from a narrow class of decisions that must, in the interest of "achieving a healthy legal system" be treated as final. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995 (1994). This Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has

been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Id.* at 1996 (citations omitted).

The issue of appealability under § 1291 of this "narrow" class of decisions "should not, and cannot, depend on a party's agility in so characterizing the right asserted," *Id.* at 1998, and "is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded or a 'particular injustice' averted by a prompt appellate court decision." *Id.* at 1996.

This "narrow class" of decisions comprises only those district court decisions (1) that are conclusive, (2) that resolve important questions completely separate from the merits, and (3) that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. *Id.* at 1995-96 (*citing Coopers & Lybrand,* 437 U.S. 463, 468 (1978)). The conditions for collateral order appeal are "stringent" and unless all three criteria are met, jurisdiction is not available under the collateral order doctrine. *Digital Equipment,* 114 S. Ct. at 1996; *Gulfstream Aerospace,* 485 U.S. at 276.

The Order of the district court finding the proposed consent decree in this case deficient and not just, fair or consistent with the mandates of CERCLA, does not meet any of the prongs of the test for interlocutory appealability.

**A. Certiorari Should Be Denied Because the Petition Fails to Identify an "Important" Explicit Statutory or Constitutional Right that Would Supply the Basis of a Collateral Order Appeal.**

In *Digital Equipment,* this Court explained that

> Where statutory and constitutional rights are concerned, "irretrievabl[e] los[s]" can hardly

> be trivial, and the collateral order doctrine might therefore be understood as reflecting the familiar principal of statutory construction that, when possible, courts should construe statutes (here § 1291) to foster harmony with other statutory and constitutional law. . . .

*Digital Equipment,* 114 S . Ct. at 2002.

This Court then made clear that the right to be trial-free obtained through a settlement agreement, as contrasted with a right grounded on an explicit, statutory or constitutional guarantee of immunity from trial, simply "does not rise to the level of importance needed for recognition under § 1291." *Id.* at 2001.

In their Petition for a Writ of Certiorari, Utah and Kennecott attempt to circumvent this Court's ruling in *Digital Equipment* by arguing that a CERCLA Trustee has an "explicit statutory right" to settle claims on its own terms and that this right is "important" as that term is used in the *Cohen* test for determining interlocutory appealability. *See* Petitioner's Brief at 9-10.[5] There is no such right "explicit" or even "implicit" in CERCLA.

CERCLA, as its name implies, is a comprehensive environmental liability act which provides for response to and cleanup of a release or threatened release of hazardous substances

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5. In the court below the Petitioners argued that the "important" issue that satisfied the *Cohen* test was whether the district court applied the proper legal standard in reviewing the consent decree. The fact that the Petitioners had the option to move pursuant to § 1292 (b) of Title 28 to have the district court certify the standard of review of a CERCLA consent decree by a district court judge, yet sought no such certification, undercuts their argument that this issue is an "important" issue justifying interlocutory appeal. In any event, this Court has made clear that whether the district court applied the wrong legal standard, is "patently irrelevant for Section 1291 purposes." *Digital Equipment,* 114 S. Ct. at 2000, n.6. Moreover, the court did not apply the wrong standard.

and for compensation for damage to natural resources. The claim asserted in the district court was a claim for damages to natural resources pursuant to CERCLA § 107(f), 42 U.S.C. § 9607(f). Under CERCLA, the natural resource damage trustee does not have authority to seek remediation or removal action pursuant to CERCLA, but only the authority to perform those acts as set forth in § 107(f).

This section provides that the governor of each state shall designate state officials who may act on behalf of the public as trustees for natural resources and shall assess the amount of damage to natural resources for the purpose of seeking monetary recovery pursuant to this section. The only explicit statutory authority granted the trustee is authority "to assess damages" and "to recover for such damages." CERCLA § 107(f)(1), (2)(B), 42 U.S.C. § 9607(f)(1), (2)(B).

Other provisions of CERCLA relating to the release or threatened release of hazardous substances provide for and encourage immediate action to remove the source of contamination and to remediate or clean up and restore the area contaminated. In this regard the President is given authority to enter into agreements to facilitate the speedy abatement of an actual or threatened release to prevent the contamination. 42 U.S.C. § 9622. However, none of these provisions apply to the authority of a state natural resource trustee.

There is nothing in CERCLA or in any other statutory or constitutional provision which grants a natural resource trustee a right to settle a claim for natural resource damages on its own terms without review by the district court. To the contrary, as contrasted with private parties who may settle their disputes on any terms which they feel reasonable, a natural resource trustee that seeks and is required by CERCLA to obtain a consent decree from a district court, can only settle if the court finds that the proposed

consent decree is "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve."[6] *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (stating that the trial court's function when reviewing proposed consent decrees under CERCLA is to "satisfy itself that the settlement is reasonable, fair and consistent with the purposes that CERCLA is intended to serve.") (citing H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3042)). A consent decree that affects the public interest or third parties imposes a heightened responsibility on the courts to protect those interests. This requirement is intended to protect those who did not participate in negotiating in the compromise, not those who negotiated it.

Indeed, Petitioners cite to no provision of CERCLA conferring such a right. For authority supporting the proposition that "CERCLA explicitly encourages settlement of claims," Petitioners cite to CERCLA § 122(a), 42 U.S.C. § 9622(a), a section that does not even apply to natural resource trustees.[7]

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6. Even the rebuttable presumption provided by CERCLA § 107(f) is not available to the state trustee in this case. Subsection (2)(C) of § 107(f), provides that there shall be "a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter" when the state trustee determines damages "in accordance with the regulations promulgated under Section 9651(c). . . ." In providing this "presumption," CERCLA clearly acknowledges that there will be judicial review of any trustee determination and that the best a trustee can be afforded is a "rebuttable presumption." In this case, however, the rebuttable presumption is not available to the trustee because he chose not to follow regulations promulgated under § 9651(c). *See* Petition at 33B (District Court's Memorandum Decision and Order).

7. The provision referenced by Petitioners in § 122(a) provides "whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation."

Aside from the fact that this section does not apply to a natural resource trustee, this section does not guarantee a right to settle even to the President to whom it does apply. At best, it only "encourages" settlements. *See* Petition at 15.

Petitioners cite to three cases as support for their proposition that CERCLA's primary goal to encourage early settlement confers on a natural resource trustee a statutory "right" to settle. *United States v. Montrose Chemical Corp.*, 827 F. Supp. 1453 (C.D. Cal. 1993); *In re Achushnet River & New Bedford Harbor,* 712 F. Supp. 1019 (D. Mass. 1989); and *New York v. Exxon Corp.*, 697 F. Supp. 677 (S.D.N.Y. 1988). Petition at 15 n.15-16. It is true that these cases each express the policy favoring settlement of disputes. However, these cases each explain that before the district court may approve a proposed consent decree, the court must scrutinize the adequacy of the settlement. *See Montrose Chemical,* 827 F. Supp. at 1458 ("Before initially approving the Proposed Decree in accordance with CERCLA, this Court must satisfy itself that the settlement is fair, reasonable, and consistent with the purposes of CERCLA."); *In Re Achushnet River,* 712 F. Supp. at 1027 ("A multiplicity of factors are considered in evaluating whether the Proposed Decree before this Court is fair and reasonable. The protection of the public interest is paramount."); *New York v. Exxon,* 697 F. Supp. at 692 ("The question then is not whether the Court disregarded any bright line procedural rules governing CERCLA settlements — there are none — but whether the procedures chosen provide the Court with sufficient information to intelligently evaluate the settlement. . . . Before approving a CERCLA settlement, the Court must be convinced that it is fair, adequate, and reasonable, and consistent with the Constitution and mandate of Congress. ").

This requirement of judicial review and approval of proposed settlements was expressed by Congress in enacting CERCLA § 122, the very section that Petitioners rely on for their claimed explicit right to settle. Recognizing that judicial examination and

approval of the settlement is necessary to protect against improper or "bad faith" settlements, the House Judiciary Committee explained that "[b]efore initially approving a consent decree under CERCLA, a court must satisfy itself that the settlement is reasonable, fair and consistent with the purposes CERCLA is intended to serve." H.R. Rep. No. 253 (III), 99th Cong., 2d. Sess., *reprinted in*, 1986 U.S. Code Cong. & Admin. News 2835, at 3038, 3042. The emphasis on settlement was not absolute. It was the intention of Congress to require active judicial involvement. "In order to accomplish this goal of review, all agreements regarding clean-up must therefore be couched in terms of a consent decree under Section 106 because this is the only section where a settlement agreement can be revised and enforced by a court." *Id.* at 2883.

Certainly Congress did not believe that § 122, the only section Petitioners refer to in support of their claimed "explicit statutory right," conferred a right on anyone (certainly not a natural resource trustee) to settle on their own terms. Congress provided that CERCLA settlements would be challenged and reviewed and only accepted if a district court found them fair and just to the public and consistent with the Congressional mandate.

> Finally, the Section provides that all issues and matters in the voluntary settlement are subject to challenge and reviewable by the Federal District Court in the consent decree process except the Administrator's determination to reimburse parties from the fund. This legislation preserves all rights of any person under existing law, including the right to file suit, the right to intervene and to be a party in the case.

*Id.* at 2885.

CERCLA requires that a court examine and approve a proposed consent decree. Nothing in CERCLA, either "implicit" or "explicit," grants a right to a natural resource trustee to settle damage claims on its own terms.

**B. The District Court's Order Did Not Resolve an Important Issue Completely Separate from the Merits of the Action.**

In addition to requiring an "important issue," the second prong of the *Cohen* test requires that the issue being raised on appeal be "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. The issue raised by Petitioners of whether a trustee has the unfettered explicit statutory right to settle a natural resource claim goes to the very heart of the litigation — whether the trustee's proposed consent decree is just, fair and consistent with CERCLA.

CERCLA clearly requires a reviewing court to determine a natural resource trustee's right to settle in light of the factual basis of the claim and whether it is fair and just in light of those facts and the purposes of CERCLA. This determination is enmeshed in the factual and legal issues comprising the Petitioners' causes of action. In fact, in their docketing statements to the Tenth Circuit, Petitioners' acknowledge that the issues raised on appeal included whether the district court erred in making certain findings of fact with regard to the sufficiency of the factual basis of the proposed settlement. *See* Portions of Docketing Statements Filed by Petitioners with the Tenth Circuit (attached hereto as Appendix C). Because the issues on appeal involve considerations that are inextricably intertwined with the factual issues going to the merits of the case, the issues on appeal are not appealable under the collateral order doctrine. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

**C. Denial of Entry of a Consent Decree Does Not Conclusively Determine the Parties' Ability to Settle Their Claims.**

To satisfy the first prong of the *Cohen* test the district court's denial of the consent decree must conclusively determine the parties' abilities to settle their claims. Orders that are "inherently tentative," that is, when "a district court ordinarily would expect to reassess and revise such an order 'in the ordinary course of litigation,' " do not meet this requirement. *Gulfstream*, 485 U.S. at 277-278; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 260 U.S. 1, 12-13 n.14 (1983).

The district court's Order denying effect to a proposed consent decree is inherently tentative. The district court did not "necessarily contemplate" that the decision will close the matter for all time. In denying the motion, the district court determined only that it should await further study and support. It does no more than permit Petitioners to propose a new consent decree within the bounds of substantive fairness. *Utah v. Kennecott Corp.*, 14 F.3d at 1494, Petition at 9A-10A. The court may also reconsider the rejected proposal upon a proper foundational basis. As the Tenth Circuit pointed out, Utah and Kennecott "are free to continue with renewed settlement efforts and further proceedings to secure court approval. Although the trial court concluded that Utah and Kennecott had not met their burden of substantive fairness under CERCLA, the trial court did not foreclose future proposed consent decrees." *Utah v. Kennecott Corp.*, 14 F.3d at 1493; Petition at 8A. Because the denial was not made with the expectation that it will be the final word on the trustee's ability to settle, it is not a conclusive determination within the meaning of the collateral order doctrine.

**D. A Right to Settle and Not to Proceed with Litigation Is Not an Important Right Effectively Unreviewable on Appeal after Judgment.**

Utah and Kennecott also argue that, since they lost the right to

settle on the specific terms of the proposed consent decree, they lost an important right that cannot be vindicated effectively after the trial has concluded. This Court, in *Digital Equipment,* concluded that, contrary to Petitioners' argument, "rights under private settlement agreements can be adequately vindicated on appeal from final judgment." *Digital Equipment,* 114 S. Ct. at 1996.

If immediate appellate review were allowed every time a trustee appointed pursuant to some statute was denied entry of a settlement agreement, "Congress' final decision rule would end up a pretty puny one and so the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third *Cohen* requirement." *Digital Equipment,* 114 S. Ct. at 1998. The order of the district court refusing to enter a consent decree on the grounds that the settlement is deficient, not just, fair or consistent with the mandates of CERCLA, does not meet the third prong of the *Cohen/Digital Equipment* test.

## III.

## THE PETITION DOES NOT PRESENT AN ISSUE IN CONFLICT AMONG THE COURTS OF APPEALS. THE COURTS ARE IN AGREEMENT THAT A DISTRICT COURT'S REFUSAL TO APPROVE A PROPOSED SETTLEMENT AGREEMENT IS NOT APPEALABLE UNDER 28 U. S. C. § 1291.

Petitioners argue that this Court should grant certiorari to resolve a conflict among circuit courts as to whether a district court's rejection of a settlement agreement is "conclusive" and thus immediately appealable under 28 U.S.C. § 1291. In examining the alleged conflict, it is important to note the distinction between cases involving a court's refusal to enter a *proposed* settlement agreement (as is the situation in the present

case) and cases involving a court's refusal to enforce a *pre-existing* settlement agreement.

With regard to the first line of cases, the circuit courts of appeals are in uniform agreement — a court's refusal to approve a proposed settlement agreement is not appealable under § 1291.[8] The only conflict that existed between the courts of appeals involved the second line of cases — cases involving a court's refusal to enforce an *existing* settlement agreement, a situation not at issue in the present case. The issue in this second group of cases

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8. *See Utah v. Kennecott*, 14 F.3d 1489 (10th Cir. 1994) (holding that denial by a district court of entry of a consent decree does not meet either the first or second prong of the *Cohen* test and is not appealable pursuant to § 1291); *E.E.O.C. v. Pan American World Airways, Inc.*, 796 F.2d 314, 318 n.7 (9th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987) (concluding that *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) had "explicitly resolved a conflict among the circuits concerning whether and pursuant to what statute an interlocutory order disapproving a consent decree was appealable." The Ninth Circuit thus disavowed its prior decision in *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), in which the court had held that a refusal to enter a consent decree was appealable under § 1291); *Donovan v. Robbins*, 752 F.2d 1170, 1172 (7th Cir. 1985) (stating in dicta that a "judge's action in refusing to approve the [consent] decree was not a final decision, appealable under 28 U.S.C. § 1291."); *New York v. Dairlea Cooperative, Inc.*, 698 F.2d 567, 570 n.10 (2d Cir. 1983) (stating in dicta that a judge's rejection of a proposed settlement agreement as neither adequate nor fair was "not appealable pursuant to 28 U.S.C. § 1291."); *Seigal v. Merrick*, 590 F.2d 35, 36 (2d Cir. 1978) (holding "that the refusal of the District Court to approve a settlement in a stockholder derivative action is not appealable under § 1291); *Carson v. American Brands, Inc.*, 606 F.2d 420, 423-24 (4th Cir. 1979) (approving of *Seigal* as an analogous case though dismissing on § 1292(a)(1) grounds), *rev'd on other grounds*, 450 U.S. 79 (1981)); *Roach v. Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972) (holding that an order denying entry of a consent judgment is not appealable on the grounds that the order cannot be deemed collateral to the main action).

centered on whether the "right not to be tried" was a right the denial of which was immediately appealable.[9]

This Court expressly granted certiorari in *Desktop Direct* "to resolve this conflict" and did so by holding that "the right not to be tried" does not supply the basis for an immediate appeal under § 1291. *Digital Equipment*, 114 S. Ct. at 2004. Thus, this Court has conclusively resolved any conflict that may have existed with regard to the appealability of pretrial orders refusing to enforce preexisting settlement agreements.

The distinction between cases involving a court's refusal to enter a *proposed* settlement agreement and cases involving a court's refusal to enforce a *pre-existing* settlement agreement is perhaps best understood by examining what Petitioners perceive to be a conflict between two opinions from the Second Circuit, *Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978) and *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989). In *Seigal*, the Second Circuit held that an order refusing to approve a *proposed* settlement in a stockholders' derivative action was not appealable under § 1291. In *Janneh*, the Court held that an order denying enforcement of a *pre-existing* settlement agreement was immediately appealable.

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9. *Compare Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir. 1993), *aff'd*, 114 S. Ct. 1992 (1994) (holding that a broad and unbounded "right not to be tried" is no grounds for immediate appeal) and *Transtech Industries, Inc. v. A & Z Septic Clean*, 5 F.3d 51, 55 (3d Cir. 1993) (following *Desktop Direct* in rejecting the "right not to be tried" as the basis for appealability under § 1291 and concluding "that the district court's denial of summary judgment and refusal to enforce a settlement is a collateral order not appealable under the Cohen exception.") *with Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir., *cert. denied*, 113 S. Ct. 412 (1992) (granting jurisdiction to review a denial of enforcement of a settlement on grounds of a right not to go to trial); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) (same); and *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989) (same), *cert. denied*, 498 U.S. 865 (1990).

In *Janneh,* the Second Circuit explained that the order regarding a preexisting settlement agreement "is quite distinct from that considered in *Seigal v. Merrick,*" in that the agreement in *Janneh* required no inquiry into the merits of the case. The only question in *Janneh* was whether the parties had reached a settlement. In *Seigal,* however, a decision whether to approve a proposed settlement required the court to examine the merits of the case by weighing "the sufficiency of the settlement." *Janneh,* 887 F.2d at 435 n.4. When factual issues such as sufficiency of settlement remain in dispute, interlocutory appeals are not authorized. *See also Chaput v. Unisys Corp.,* 964 F.2d 1299 (2d Cir. 1992) (explaining *Janneh*).

In the present case, as in *Seigal,* the District Court was not faced with the issue of whether a settlement had been reached between Utah and Kennecott. Rather, the Court was presented with the task of determining whether the proposed settlement agreement reached by Utah and Kennecott was "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." Because factual issues concerning the sufficiency of the settlement agreement at issue in this case remain in dispute, the Tenth Circuit correctly held that the district court's refusal to approve the settlement is not immediately appealable. This decision is not in conflict with opinions of other courts of appeals or with the Supreme Court's opinion in *Digital Equipment.*

## IV.

## PETITIONERS HAVE IMPROPERLY RAISED AN ISSUE IN THE PETITION FOR CERTIORARI THAT WAS NOT PRESENTED BELOW.

This Court has made clear that, although not precluded from doing so, the Court will "not normally decide issues not presented below." *Carlson v. Green,* 446 U.S. 14, 17 (1980); *see also Air Courier Conference of American v. American Postal Workers*

*Union*, 498 U.S. 517, 522, 111 S. Ct. 913, 917 (1991) (refusing to consider issue not argued to either of the lower courts); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 (1989) (declining to consider issue not argued to the Court of Appeals).

In their Petition for a Writ of Certiorari, Utah and Kennecott ask this Court to consider whether a CERCLA Trustee has a statutory or constitutional right to settle claims on its own terms and whether this right, if it exists, is "important" as that term is used in the *Cohen* test for determining interlocutory appealability. Petitioner's Brief at 9. This is an issue that the Petitioners did not raise before the Tenth Circuit Court of Appeals.

In their brief regarding appellate jurisdiction filed in the court below, Petitioners argued that the central issue in the appeal which allegedly satisfied the "important" requirement of *Cohen* was "the correct standard of review to be applied to a proposed settlement of a natural resource damages claim by a federal district court." *See* Joint Memorandum Brief of the State of Utah and Kennecott Corporation Regarding Appellate Jurisdiction (pertinent portions of which are attached as Appendix D), at 23a-24a. *See also*, Portions of Docketing Statements Filed by Petitioners with the Tenth Circuit (Appendix C), at 20a-21a (Petitioners list "Issues to Be Raised on Appeal" as (1) "Whether, in reviewing the Proposed Consent Decree, the District Court applied incorrect legal standards. . . ." and (2) Whether the District Court erred in making certain findings of fact with regard to the sufficiency of the factual basis of the proposed settlement). This Court has previously explained that an argument that interlocutory appealability can be based on a district court's applying the "wrong legal standard" must be rejected "as patently irrelevant for § 1291 purposes." *Digital Equipment*, 114 S. Ct. at 2000 n.6.

Petitioners did not argue to the Tenth Circuit that a natural

resource trustee has a "statutory" right to settle natural resource claims on its own terms and that the denial of such a right, if it exists, is "important" under *Cohen*. Consequently, this Court should refuse to now consider this issue on a Writ of Certiorari.

## CONCLUSION

This Petition does not present a special or important issue for review. The law in this area has been recently clarified by this Court's Opinion in *Digital Equipment*. There is no need to reaffirm that opinion, the law is clear and any possible conflict among the courts of appeals was resolved by *Digital Equipment*. The Petition for Certiorari should be denied.

Respectfully submitted,

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## APPENDIX A — CERCLA § 107(f), 42 U.S.C. § 9607(f)

CERCLA § 107(f), 42 U.S.C. § 9607(f):

(f) Actions involving natural resources; maintenance, scope etc.

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under

this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

*Appendix A*

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

* * *

**APPENDIX B — *UTAH V. KENNECOTT*, CASE NO. C86-902, PORTIONS OF TRANSCRIPT OF OCTOBER 25, 1991 HEARING (D. UTAH)**

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. C86-902

STATE OF UTAH, BY AND THROUGH THE UTAH STATE DEPARTMENT OF HEALTH,

Plaintiff,

vs.

KENNECOTT CORPORATION,

Defendant.

Salt Lake City, Utah
Date: October 25, 1991
Time: 2:00 p.m.

REPORTER'S TRANSCRIPT

BEFORE: THE HONORABLE J. THOMAS GREENE

APPEARANCES OF COUNSEL:

For the Plaintiff: FRED G. NELSON, ESQ. and
DENICE CHANCELLOR, ESQ.

*Appendix B*

For the Defendant: JAMES LEE, ESQ.
DAVID TUNDERMANN, ESQ.
ROBERT LONERGAN, ESQ.,
RICHARD PIERCE, ESQ.,
DALLIN JENSEN, ESQ., and
DALE BUTLER, ESQ.

For the Intervenor: DOUGLAS PARRY, ESQ.
DALE F. GARDINER, ESQ. and
BLAKE ATKIN, ESQ.

For Utah Chapter Sierra Club: KENLEY W. BRUNSDALE, ESQ.

Court Reporter: REEVE M. BUTLER, RPR
Official Court Reporter
Rm. 224 Federal Bldg.
350 S. Main Street
Salt Lake City, Utah 84101
Tel. 328-0837

* * *

[108] on that chart, and those assumptions are all before you, Your Honor.

The explanation of that process is in the administrative record. In fact, I'm reading from or my notes are pages 2 and 3 of Kennecott's response to the public comments.

THE COURT: And does — have you presented and is it before me how those assumptions are translated into 12 million dollars?

MR. TUNDERMANN: No, Your Honor.

THE COURT: Why didn't you say $24 million or $6 million?

MR. TUNDERMANN: We each had our bottom lines, Your Honor, and somewhere in the bargaining a deal was struck; that's what —

THE COURT: How can I tell whether what you have done is reasonable?

MR. TUNDERMANN: We have described to you our process.

THE COURT: Are you describing the process?

MR. TUNDERMANN: We have described the process. I believe, your Honor, under the cases, for the settlement to be approvable by the court, it needs to be fair and reasonable and consistent with the statute.

Fairness is measured by essentially a procedural [109] test where the parties are sufficiently adversarial, that the settlement they strike can be regarded as a fair one and if we come to you together and make that representation, I think we're entitled to a presumption that it is fair.

Reasonableness — and these cases are cited in our report, Your Honor. The Cannon Engineering case, the Vertac Chemical case, the Roman Haws case; the courts have said: In reviewing CERCLA consent decrees, courts defer to the judgment of the Environmental Enforcement Agency that negotiates the decree, since the agency has the expertise to determine whether a decree will help or hinder the effort.

*Appendix B*

THE COURT: So really all I need to know is whether you people really believe that it's just and reasonable and fair, and you having said that, that's an adequate basis for the court to determine, yes, it must be fair and reasonable.

MR. TUNDERMANN: If you conclude, Your Honor —

THE COURT: Is that what you're saying to me?

MR. TUNDERMANN: I'm saying to you, if you believe our representations that we were adversarial and discussions were across the table at arm's length, if you believe our representations that we had sharply adverse interests and balanced a lot of complex competing factors to reach a resolution, and if you believe that the settlement is consistent with the statute, that's all you need to believe.

THE COURT: Well, I could approve any figure you [110] came up with then; that's all I need, just your statement that it's fair. I mean, you could have got by for $6 million.

MR. TUNDERMANN: Yes, we might have; that would have been a better deal for us and a less good deal for the state, but that's not where we wound up.

THE COURT: Because the state agreed to $12 million, you're saying that's the only necessary factual basis for the court to have, having satisfied itself that here are adversarial parties, they have bargained, they negotiated, they looked at all of the facts, they bargained and drove a hard bargain and that should be approved because they were adversary parties.

MR. TUNDERMANN: Absent evidence of collusion or bad faith, I think that's all Your Honor needs.

*Appendix B*

THE COURT: I think you demonstrated in your papers that the court has no business trying to determine what the very best settlement could be; of trying to find out if there is a better possible settlement; that isn't the business of the court.

The business of the court is to determine whether the settlement that you've arrived at is just and fair and I'm a little troubled about the basis on which I'm asked to come to that.

I'll take the matter under advisement, all matter under advisement; court's in recess.

* * *

[111]

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH

COUNTY OF SALT LAKE

I, REEVE M. BUTLER, do hereby certify that I am an Official Court Reporter for the United States District Court for the District of Utah;

That as such Reporter I attended the hearing of the foregoing matter on October 25, 1991, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages numbered from 2 to 111 constitute a full, true and correct report of the same.

DATED at Salt Lake City, Utah, this 17th day of December, 1991.

*Appendix B*

s/ Reeve M. Butler
REEVE M. BUTLER, RPR

## APPENDIX C — PORTIONS OF DOCKETING STATEMENTS FILED WITH THE TENTH CIRCUIT BY PETITIONERS

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: *Utah v. Kennecott*

Court/Agency: *United States District Court for the District of Utah, Central Division*

Court/Agency Docket No.: *CV 86-0902G*

District Judge: *J. Thomas Greene*

Party or Parties filing Appeal/Petition: *Defendant Kennecott Corporation*

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. Appeal from District Court

1. Date notice of appeal filed: *October 2, 1992*

   a. Was a motion filed for an extension of time to file notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal: *No*

   b. Is the United States or an officer or an agency thereof a party to this appeal? *No*

*Appendix C*

2. Authority fixing time limit for filing notice of appeal: *Fed. R. App. P. 4 (a)(1)*

3. Date final judgment or order to be reviewed was filed and *entered* on district court docket sheet: *September 3, 1992*

   a. Does the judgment or order to be reviewed dispose of *all* claims by and against *all* parties? SEE Fed. R. Civ. P. 54(b). *No*

*Appendix C*

ATTACHMENT TO DOCKETING STATEMENT
for the
UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

Utah v. Kennecott Lower Docket No. 86-0902G

I. 3. c. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. § 1292(a)?

Yes. The District Court refused to enter the consent decree in part because that decree did not order Kennecott to control potential sources of ground water contamination or to contain and manage the existing plume of contamination. Thus, the Court's Order has the practical affect of requiring an injunction as a condition of settlement and is therefore appealable under 28 U.S.C. § 1292(a)(1).

III. GIVE BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW.

This is an action for natural resource damages under section 107 of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") 42, U.S.C. § 9607. A complaint was filed on October 3, 1986 by the State of Utah, by and through the Utah Department of Health, against defendant Kennecott Corporation, alleging that Kennecott was responsible for damages to ground water resources under the trusteeship of the State of Utah within the meaning of CERCLA. Further proceedings were stayed pending completion of technical studies, and further stays were granted to allow settlement

negotiations to proceed. As a result of these stays, as of the filing of this Docketing Statement, Kennecott has not filed an answer to the complaint.

On July 30, 1991, a settlement was reached between the State of Utah, represented by the Director of the Utah Department of Environmental Quality, the individual designated by the Governor as the Trustee for natural resources pursuant to CERCLA § 9607(f)(2), and defendant Kennecott Corporation. The terms of the settlement were embodied in a proposed consent decree and released for public review and comment. The parties evaluated the comments received, modified the proposed consent decree to respond to comments, and on September 23, 1991, submitted a modified consent decree to the District Court for approval and entry. The District Court ordered a discovery period and evidentiary hearing on four issues related to the proposed consent decree and the status of a potential intervenor. That evidentiary hearing began on March 23, 1992 and lasted for six days. Closing arguments were heard on May 14, 1992. On September 3, 1992, the District Court entered an Order denying the request to approve and enter the Consent Decree, granting the motion to intervene, and directing the parties to submit a discovery plan. Defendant Kennecott appeals from the September 3, 1992 Order.

IV. ISSUES TO BE RAISED ON APPEAL.

A. Whether, in reviewing the Proposed Consent Decree, the District Court applied incorrect legal standards, including

1. applying a "preponderance of the evidence" standard;

2. refusing to accord any presumption of validity to the settlement agreed to by the parties; and

3. failing to consider other relevant factors relating to the litigation, including a comparison of the strengths of the plaintiff's case versus the amount of the settlement offer, the likely complexity, length and expense of the litigation, the opinion of competent counsel, the stage of the proceedings and the amount of discovery already undertaken at the time of settlement, and the potential benefits associated with immediate payment of damages in weighing the fairness and reasonableness of the settlement?

B. Whether the District Court erred by refusing to defer to the judgment of the Trustee (the Director of Utah's Department of Environmental Quality), and instead substituting the Court's judgment for the Trustee's on the following issues:

1. technical studies in support of the settlement were adequate;

2. restoration of the ground water aquifer through active treatment was not technically feasible;

3. source control and remediation of the aquifer were more appropriately addressed through in separate negotiations involving the federal Environmental

Protection Agency, rather than incorporated into the natural resource damages settlement;

4. nature and extent of damage to the ground water aquifer caused by Kennecott was properly measured by the settlement;

5. the value of the damaged ground water was properly measured; and

6. the amount of the settlement was reasonable?

C. Whether the District Court erred in rejecting the Proposed Consent Decree because the settlement did not include relief that the Trustee was not authorized by CERCLA to seek or require?

D. Whether the District Court properly stated the measure of damages under CERCLA?

E. Whether the District Court erred in: (1) refusing to approve the settlement as structured by the Trustee; and (2) not permitting the Trustee to settle, even though the Trustee assumed for purposes of the settlement — contrary to fact — that the use of all water within a specified area (the "Mining Impact Area") would be lost forever, and limited the release and covenant not to sue Kennecott *only* to any injury to natural resources within the Mining Impact Area?

F. Whether, if reviewed under the proper legal standards, with appropriate deference to the settlement of the parties and the Trustee's technical judgment, the

evidence before the District Court required the conclusion that the Proposed Consent Decree is fair, reasonable and consistent with the requirements of CERCLA?

VI. INDICATE WHETHER *ORAL ARGUMENT* IS DESIRED IN THIS APPEAL. IF SO, WHY IN YOUR OPINION SHOULD ARGUMENT BE HEARD?

Oral argument is desired. Oral argument on this appeal should be heard because CERCLA is a notoriously complicated statute and the standards governing judicial scrutiny of a CERCLA natural resource damages settlement have not been decided by the Tenth Circuit Court of Appeals or the United State Supreme Court. Appellant believes that oral argument will assist the Court in reviewing (1) the provisions of CERCLA applicable to the Order being appealed from; (2) the standard of review that the District Court should have applied to the Proposed Consent Decree; and (3) the terms of the Proposed Consent Decree.

*Appendix C*

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: *STATE OF UTAH V. KENNECOTT*

Court/Agency: *UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION*

Court/Agency Docket No.: *CV 86-0902G*

District Judge: *J. THOMAS GREENE*

Party or Parties filing Appeal/Petition: *PLAINTIFF STATE OF UTAH*

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. Appeal from District Court

1. Date notice of appeal filed: *OCTOBER 16, 1992*

   a. Was a motion filed for an extension of time to file notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal: *NO*

   b. Is the United States or an officer or an agency thereof a party to this appeal? *NO*

2. Authority fixing time limit for filing notice of appeal: *Fed. R. App. P. 4 (a)(3)*

*Appendix C*

3. Date final judgment or order to be reviewed was filed and *entered* on district court docket sheet: *SEPTEMBER 3, 1992*

   a. Does the judgment or order to be reviewed dispose of *all* claims by and against *all* parties? SEE Fed. R. Civ. P. 54(b). *NO*

*Appendix C*

ATTACHMENT TO DOCKETING STATEMENT
for the
UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

UTAH V. KENNECOTT LOWER DOCKET NO. 86-0902G

III. GIVE BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW.

The State filed this action for natural resource damages under section 107 of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607. A complaint was filed on October 3, 1986 against defendant Kennecott Corporation, alleging that Kennecott was responsible for damages to surface and ground water resources. The proceedings were stayed pending completion of a 5-year study to define the nature and extent of the contamination.

On July 30, 1991, a proposed settlement was filed with the District Court and made available for public review and comment. The State and Kennecott evaluated the comments received, modified the proposed consent decree to respond to comments, and on September 23, 1991, submitted a Modified Consent Decree to the District Court for approval and entry. The Salt Lake Water Conservancy District moved to intervene opposing entry of the Modified Consent Decree. The District Court ordered a discovery period and evidentiary hearing on the proposed consent decree and intervention request. An evidentiary hearing began on March 23, 1992 and lasted for six days. Closing arguments were heard on May 14, 1992. On September 3,

1992, the District Court entered a Memorandum Decision and Order denying the request to approve and enter the Modified Consent Decree and allowed permissive intervention by the Water Conservancy District. Defendant Kennecott appealed from the September 3, 1992 Order (Appeal No. 92-4173). The District filed a cross-appeal. The State of Utah has also now filed an appeal from the Order.

## IV. ISSUES TO BE RAISED ON APPEAL

A. Did the District Court use the correct standard of review and consider the relevant factors in making the determination that the Modified Consent Decree was not fair and reasonable and consistent with the provisions of CERCLA?

B. Did the District Court err by not giving deference to the conclusions of the State Trustee appointed under § 107 (f) of CERCLA, on the technical studies that support the settlement, specifically on the nature and extent of the contamination, the feasibility of restoration, and the value of the injury to the resource.

C. Did the District Court err in concluding that the State Trustee did not use a valuation method for injury to natural resources which was consistent with CERCLA?

D. Did the District Court err in concluding that a Decree settling a State Trustee's claim for natural resource damage must contain requirements for remedial measures to be consistent with CERCLA?

*Appendix C*

E. Did the District Court err in making findings which did not recognize the limitation in the scope of the Modified Consent Decree as a settlement of only claims for injury to groundwater and surface water within the Mining Impact Area?

## APPENDIX D — PORTIONS OF JOINT MEMORANDUM BRIEF OF THE STATE OF UTAH AND KENNECOTT CORPORATION REGARDING APPELLATE JURISDICTION

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 92-4173
92-4179
92-4180

THE STATE OF UTAH, BY AND THROUGH THE UTAH STATE DEPARTMENT OF HEALTH,

Plaintiff-Appellant,

vs.

KENNECOTT CORPORATION,

Defendant-Appellant,

SALT LAKE COUNTY WATER CONSERVANCY DISTRICT,

Intervenor-Appellee.

On Appeal from the United States District Court
District of Utah, Central Division
Honorable J. Thomas Greene, Jr., District Judge
Civil No. 86-C-0902G

JOINT MEMORANDUM BRIEF OF THE STATE OF UTAH AND KENNECOTT CORPORATION REGARDING APPELLATE JURISDICTION AND JOINT RESPONSE TO THE SALT LAKE COUNTY WATER CONSERVANCY DISTRICT'S MOTIONS TO DISMISS FOR LACK OF JURISDICTION

*Appendix D*

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* * *

B. The Order Resolves An Important Issue Completely Separate From The Merits Of The Action

As explained above, the central issue in this appeal is the correct standard of review to be applied to a proposed settlement of a natural resource damages claim by a federal district court. That question is important — because it effectively determines a Trustee's ability to settle such a claim — and it is completely separate from the merits of the underlying claim. Accordingly, appellate review of the Order would not involve "considerations that are 'enmeshed in the factual and legal issues comprising' " Utah's claim for natural resource damages. *See Coopers & Lybrand,* 437 U.S. at 469 (quoting *Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 555, 558 (1963)).

More generally, appeal of the Order is collateral to the merits of the underlying claim because Utah and Kennecott negotiated

and submitted the Modified Consent Decree for the purpose of ending the litigation and avoiding a trial on the merits of the action. Thus, the review of the Modified Consent Decree, either by the district court in the first instance or by this Court on appeal, does not involve an inquiry into the merits of Utah's claim for natural resource damages. *Cf. In re General Motors Corp. Engine Interchange Lit.*, 594 F.2d 1106, 1118-19 (7th Cir.) (order approving subclass settlement was appealable as a collateral order because it was "completely separate from the merits of the action"), *cert. denied*, 444 U.S. 879 (1979).

* * *